Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

C. VOLANTE CORP.,

Petitioner,

v.

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL, and ANIELLO MADONNA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Eastern District of New York's determination that a current, executed collective bargaining agreement is not necessary in order to invoke the District Court's jurisdiction, pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act and Section 515 of the Employee Retirement Income Security Act, as the *Volante* decision is in direct conflict with Second Circuit and Fifth Circuit precedent holding that the existence of a current, executed agreement during the time period for which contributions are sought is necessary to invoke the District Court's jurisdiction and that in the absence of a current agreement, jurisdiction to determine whether an employer is obligated to make post-contract contributions is exclusively vested in the NLRB?

2. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Eastern District of New York's determination that an employer may adopt the terms of an unexecuted collective bargaining agreement through a course of conduct as the *Volante* decision is in direct conflict with Second, Third, Fifth, Sixth, Seventh, and Ninth Circuit precedent holding that the District Court lacks jurisdiction to determine whether an employer is obligated to make post-contract contributions after the expiration of a current collective bargaining agreement, pursuant to Section 302(c)(5)(B) of the Labor Management Relations Act and Section 515 of the Employee Retirement Income Security Act, as jurisdiction to make such determination is exclusively vested in the NLRB, and holding that there does not exist a federal common law cause of action for breach of an implied collective bargaining agreement?

3. Did the United States Court of Appeals for the Second Circuit err in affirming the United States District Court for the Eastern District of New York's determination that C. Volante Corp. adopted the terms of the unexecuted collective bargaining agreements based upon C. Volante Corp.'s course of conduct and notwithstanding Second, Third, and Fifth Circuit precedent holding that such conduct is not tantamount to the adoption of an unexecuted collective bargaining agreement?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the Petitioner C. Volante Corp. and the Respondents Johnnie Brown, Theodore King, Aldo Colussi, George Finch, Chester Broman, Joseph Ferrara, Frank Finkel, and Aniello Madonna, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds.

STATEMENT PURSUANT TO RULE 29.6

The petitioner is a New York corporation. The petitioner is not a publicly held company and has no parent companies or nonwholly owned subsidiaries or affiliates.

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Petitioner C. Volante Corp. (herein "Volante"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this matter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which appears in Appendix A, is reported at 1999 WL 807724, 162 L.R.R.M. (BNA) 2457. The Amended Final Judgment of the United States District Court for the Eastern District of New York and the Opinion and Order of the United States District Court for the Eastern District of New York, which appear respectively in Appendices B and C, are unpublished decisions but the Opinion and Order can be found at 1997 WL 441799.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on October 8, 1999. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 302(c)(5)(B) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5)(B) and Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1145 appear in Appendix D.

STATEMENT OF THE CASE

The fundamental question in this matter is whether the Second Circuit properly found that the District Court had jurisdiction to determine whether an employer had an obligation to contribute to an employee benefit fund in the absence of a

signed, current collective bargaining agreement during the time period for which contributions were sought, pursuant to § 515 of ERISA, § 302(c)(5)(B) of the LMRA, and the United States Supreme Court's decision in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete*, 484 U.S. 539, 108 S. Ct. 830 (1988). Additionally, a question exists as to whether the Second Circuit properly affirmed the District Court's determination that there exists a cause of action for breach of an adopted collective bargaining agreement. Further, the question exists as to whether the Second Circuit properly affirmed the District Court's determination that Volante adopted unsigned agreements through its course of conduct.

The Second Circuit erroneously declined to apply *Advanced Lightweight, supra* which provides that district courts lack subject matter jurisdiction to determine whether an employer has an obligation to make benefit fund contributions for any period subsequent to the expiration of a collective bargaining agreement and holds that the NLRB has exclusive jurisdiction over such disputes. *Id.* at 549. The precedent within the Second Circuit: (a) has held that there is no federal cause of action for breach of an implied contract; (b) has declined to follow an adoption of contract theory; and (c) has found that a current, signed agreement is critical to the Court's jurisdiction. Thus, the Second Circuit erroneously affirmed the District Court's conclusion that the central issue was whether Volante was bound by collective bargaining agreements to which it was not a signatory rather than whether the Court had jurisdiction to determine whether Volante had any obligation to the Funds after the expiration of Volante's last agreement.

Federal jurisdiction was invoked pursuant to ERISA §§ 502(a)(3), 502(d)(1), 502(e), 502(f), and 502(g), 29 U.S.C. §§ 1132 (a)(3), 1132(d)(1), 1132 (e), 1132(f), and 1132(g), and LMRA § 302, 29 U.S.C. § 186.

The Funds are employee benefit plans governed by ERISA and were established pursuant to the terms of various collective bargaining agreements between Local 282 and signatory employers who are required to make contributions to the Funds on behalf of their employees covered by the collective bargaining agreements.

The obligations to the Funds of the signatory employers are set forth in Agreements and Declarations of Trust of the Funds (herein "Trust Agreement"). The Trust Agreement specifically defines "employer" as " 'each employer who has *duly executed* a collective bargaining agreement with the Union.' Trust Agreement at 1, Section 1." (Emphasis added).

Volante is a truck rental company located at 7 Evergreen Avenue, Lynbrook, New York. Rita Volante was the Chief Operating Officer of the company from 1962 until September of 1995, at which point she suffered an incapacitating stroke.

Volante has not been a signatory to any collective bargaining agreement with Local 282 since the expiration of an agreement which was effective from July 1, 1987 through June 30, 1990. Plaintiffs commenced this action to recover benefit fund contributions during the period May 30, 1990 through September 30, 1993. Thus, with the exception of the one month period of May 30, 1990 through June 30, 1990, the Funds have commenced this action to recover contributions for a time during which there was no current collective bargaining agreement in effect.[1]

The Funds audited Volante's books and records and determined that Volante was allegedly delinquent in the payment of contributions in the sum of $78,183.87.

By letter to the Funds dated January 20, 1995, Rita Volante addressed the issue of the alleged deficiency. Ms. Volante

1. At no time did Volante ever sign any Local 282 Trust Agreement.

asserted that Volante had utilized drivers on a temporary basis who were employees of another trucking firm and that she was under the assumption that they were paying there own benefits. While Ms. Volante made reference to an undefined "responsibility to the funds", she pointed out that Volante did not have a signed contract with Local 282 since 1989.[2] The Funds rejected the settlement offer proposed by Ms. Volante.

Notably, by letter dated September 12, 1995, Local 282 Contract Department Representative Kathy Cassel acknowledged the nonexistence of any collective bargaining agreements between Volante and the union during the time period of July 1, 1990 through June 30, 1996 and rejected the application of one of Volante's drivers, Louis Accerio, to join Local 282. Local 282 informed the company that "[a]lthough we are aware that your dues and benefit contributions are paid timely and to date", the application of Mr. Accerio to join the Union was denied because Volante was not a signatory the 1990-1993 and 1993-1996 collective bargaining agreements. Thus, such letter unambiguously informed Volante that Local 282 did not recognize the existence of any collective bargaining agreement during the periods 1990-1993 and 1993-1996.

Moreover, such letter indicated that Volante could chose to "reactivate" its collective bargaining relationship by filling in an effective date and by returning the enclosed contracts to be countersigned by a Local 282 officer. At no time did Volante sign such agreements or "reactivate" such relationship.

Moreover, subsequent to the expiration of the July 1, 1987 through June 30, 1990 collective bargaining agreement, Volante did not adhere to the terms of any subsequent collective bargaining agreement except that during the time period encompassed by the audit Volante voluntarily submitted remittance reports and contributions to the Funds, but did not contribute in accordance with the specific terms of the

2. Volante's last collective agreement expired on June 30, 1990.

agreements. Volante did not pay wages by relying on the specific provisions of the Local 282 agreements, but rather paid the wage rate as provided to them by another contractor for whom Volante did trucking. Volante did not exclusively employ drivers who were members of Local 282. Thus, Volante's conduct was not in compliance with the terms of the 1990-1993 and 1993-1996 agreements.

Thus, it is Volante's position that: (a) the District Court lacked jurisdiction to determine whether Volante had an obligation to contribute to the Funds for a time period during which there was no signed, current collective bargaining agreement in effect; (b) the Second Circuit improperly affirmed the District Court's determination that there exists a claim for breach of an adopted collective bargaining agreement; and (c) Volante's conduct was not tantamount to an adoption of the unexecuted agreements.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED AS THE *VOLANTE* DECISION, HOLDING THAT THE EXISTENCE OF A CURRENT, EXECUTED COLLECTIVE BARGAINING AGREEMENT IS NOT NECESSARY TO INVOKE THE DISTRICT COURT'S JURISDICTION PURSUANT TO THE LMRA AND ERISA, IS IN DIRECT CONFLICT WITH SECOND CIRCUIT AND FIFTH CIRCUIT PRECEDENT HOLDING THAT A CURRENT, EXECUTED AGREEMENT DURING THE TIME PERIOD FOR WHICH BENEFIT FUND CONTRIBUTIONS ARE SOUGHT IS NECESSARY TO INVOKE THE COURT'S JURISDICTION

To invoke the District Court's jurisdiction, §§ 402(a) and 515 of ERISA, 29 U.S.C. §§ 1102(a) and 1145, and

§ 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B), require the existence of a current, written collective bargaining agreement during the period for which contributions are sought.

Advanced Lightweight, *supra*, holds that District Courts lack subject matter jurisdiction over claims for contributions allegedly due for any period subsequent to the expiration of a collective bargaining agreement and further holds that the NLRB has exclusive jurisdiction over disputes concerning whether an employer has a continuing obligation to make post-contract contributions. *Id.* at 549. *See also Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207, 111 S. Ct. 2215 (1991) (the NLRB has jurisdiction over any failure to make contributions after the expiration of a collective bargaining agreement and the District Court lacks jurisdiction under ERISA). The Court in *Advanced Lightweight* found that "the text of § 515 plainly describes the employer's contractual obligation to make contributions but omits any reference to a noncontractual obligation imposed by NLRA," *Id.* at 546. Section 515 "is limited to the collection of 'promised contributions', and does not confer jurisdiction on district courts to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the NLRA." *Id.* at 548.

Within the Second Circuit, *Advanced Lightweight* has been followed. In *United Automobile, Aerospace & Agricultural Implement Workers of America, Local 33 v. R.E. Dietz Co.*, 996 F.2d 592, 597 (2nd Cir. 1993), the Second Circuit, following *Advanced Lightweight*, found that without a current agreement, no "promised contributions" existed. Federal court jurisdiction did not exist under ERISA § 502, but jurisdiction was found to be exclusively vested in the NLRB. *Dietz*, *supra* at 597.

Further, in *Derrico v. Sheehan Emergency Hospital*, 844 F.2d 22, 25 (2nd Cir. 1988) the Court found that when the Complaint alleges a cause of action for a period after the

expiration of a collective bargaining agreement, the Court lacks jurisdiction pursuant to LMRA § 301. The Court found that § 301 has no application without a currently effective collective bargaining agreement. *Id.* at 24.

Significantly, in *Moglia v. Geoghegan*, 403 F.2d 110, 118 (2nd Cir. 1968), the Second Circuit found that without a signature on the collective bargaining agreement, a "written agreement" under § 302(c)(5)(B) does not exist. *Moglia*, noted that LMRA § 302 provides that any payment made to a trust fund is forbidden unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." *Id.* at 116. *Moglia* specifically rejected the appellant's contention that LMRA § 302(c)(5)(B) does not require a signed, written agreement and held that "[w]e do not agree with appellant's analysis." *Id.* at 118.

Additionally, the Second Circuit's decision in *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2nd Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), noted that jurisdiction in the District Court pursuant to ERISA exists "once an employer *knowingly signs* an agreement that requires him to contribute to an employee benefit plan . . ." (Emphasis added). *Id.* at 314. Further, *Benson*, citing *Advanced Lightweight*, notes that "an employer's liability . . . is not limitless because an employer is liable under § 515 only for the effective period of the collective bargaining agreement." *Id.* at 316.

Volante was not a party to a collective bargaining agreement with Local 282 during the time period for which contributions are sought. Further, after the expiration of the 1987-1990 agreement, the only correspondence Volante received from Local 282 regarding the existence, or lack thereof, of a contract was the September 12, 1995 letter which admitted the non-existence of a collective bargaining relationship since June 30, 1990 because Volante had not signed the subsequent agreements and stated that the agreement could only be "reactivated" by filing

in an "effective date." Thus, such letter unambiguously informed Volante that Local 282 did not recognize the existence of any collective bargaining agreement during the periods 1990-1993 and 1993-1996.

As the Funds seek contributions for a period wherein there was no current, signed collective bargaining agreement in effect, the NLRB has exclusive jurisdiction, pursuant to *Advanced Lightweight* and its Second Circuit progeny. Thus, the Second Circuit improperly affirmed the District Court's conclusion that it had jurisdiction to determine whether Volante had an obligation to contribute subsequent to the expiration of the 1987-1990 agreement.

The Second Circuit in *Volante* recognized that *Advanced Lightweight* holds that §§ 502(g) and 515 of ERISA do not confer subject matter jurisdiction over claims to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the NLRA,[3] but only confers subject matter jurisdiction for "promised contributions" pursuant to a current, effective collective bargaining agreement. However, the Second Circuit in *Volante* incorrectly found that such holding "stands only for the unremarkable proposition that the [NLRB] generally has exclusive jurisdiction over unfair labor practice claims." (App. A at 5a). While *Volante* noted that "it is true that the Trustees' claims arise from appellant's alleged failure to contribute to the Fund after the signed CBA expired," the Court incorrectly determined that "this does not render them per se unfair labor practice claims over which the district court lacks jurisdiction under *Advanced Lightweight*." (App. A at 6a).

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3. An employer's unilateral decision to refuse to make post-contract contributions may constitute a violation of the NLRA, specifically, an unfair labor practice for refusal to bargain in good faith by failing to make such post-contract contributions before negotiations for a new contract reach impasse.

The Second Circuit incorrectly premised this conclusion by noting that the Trustees did not claim that Volante refused to bargain by making unilateral changes before reaching impasse, but claimed, pursuant to ERISA § 515, that Volante allegedly adopted two collective bargaining agreements that it did not sign. (App. A at 6a). However, the Court in *Advanced Lightweight* found that it is irrelevant that a fund does not institute the action pursuant to the NLRA alleging an employer's alleged failure to maintain the status quo.

In *Advanced Lightweight*, the lawsuit for contributions allegedly owing for a time period after the expiration of a collective bargaining agreement was instituted pursuant to §§ 502(g)(2) and 515 of ERISA and § 8(a)(5) of the NLRA. *Id.* at 539. The Court found that the District Court did not have jurisdiction and held that "[a]s a general rule, federal courts do not have jurisdiction over activity that is 'arguably subject to . . . § 8 of the [NLRA],' and that they 'must defer to the exclusive competence of the [NLRB].' " *Id.* at 539 n.4, 552.

Accordingly, the Court in *Volante*, *supra* failed to follow *Advanced Lightweight*, as well as the Second Circuit's own decisions in *Dietz* and *Derrico*, holding that the NLRB has exclusive jurisdiction over disputes concerning whether an employer has an obligation to make post-contract contributions.

Moreover, the Court in *Volante* failed to follow the Second Circuit precedent established in *Moglia*, *supra*, holding that without a signature on the collective bargaining agreement, a "written agreement" under § 302(c)(5)(B) does not exist. *Id.* at 118. The Court in *Volante* erroneously found that the subsequent unsigned collective bargaining agreements constituted a "written agreement" under LMRA § 302(c)(5)(B). (App. A at 8a). *Volante*, *supra* erroneously holds that the statutory language of § 302(c)(5)(B) only requires that an agreement be written, but not signed. (App. A at 8a). In incorrectly holding same, *Volante*, *supra* ignored that *Moglia*, *supra* extensively discussed

Congress' purpose behind § 302(c)(5) in determining that a signature on the agreement is required for it to constitute a "written agreement." *Moglia, supra* found that "[o]ur construction of § 302 may work a hardship in the instant case . . . but we consider the construction of the statute that we have adopted is the only acceptable one in light of the congressional history and intent." *Id.* at 116.

Accordingly, the Second Circuit's citation of the out of Circuit decisions in *Gariup v. Birchler*, 777 F.2d 370, 375 (7th Cir. 1985) for the proposition that § 302(c)(5)(B) does not require a signed, unexpired collective bargaining agreement and *Moriarty v. Lewis Funeral Directors*, 150 F.3d 773, 777 (7th Cir. 1998) for the proposition that § 302(c)(5)(B) permits an employer to adopt a collective bargaining agreement by a course of conduct, and that a signature is unnecessary, directly conflicts with prior Second Circuit precedent in *Moglia* and *Benson, supra.*

Significantly, the Fifth Circuit's decision in *Firesheets v. A.G. Building Specialists, Inc.*, 134 F.3d 729 (5th Cir. 1998) adheres to the signature requirement set forth in *Moglia.* In *Firesheets, supra,* involving an employer's alleged obligation to make post-contact contributions, the Court cited *Moglia* as the "lead case . . . on this point" and held that a written agreement under § 302(c)(5)(B) does not exist without a signature on the collective bargaining agreement. *Firesheets, supra* at 732. The Fifth Circuit noted that a contrary finding ". . . would not only be inconsistent with precedent, but would undermine the congressional intent for § 302(c) . . ." *Id.*

Additionally, the Court in *Volante, supra* incorrectly found that the Second Circuit's decision in *Moglia* only rejected the appellant's claim as the employer in *Moglia* did not engage in conduct manifesting an intent to adopt the terms of the agreement. (App. A at 8a). Rather, the *Moglia* decision rejected the appellant's claim based upon the fact that LMRA

§ 302(c)(5)(B) requires a signed, written agreement. *Id.* at 118. Moreover, the Court in *Volante*, in attempting to distinguish the instant matter from *Moglia*, found that a distinction should be made as the employer in *Moglia* "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." (App. A at 8a). However, in *Moglia*, the Second Circuit made such a finding although the employer continued to pay scale wages and contribute to the Local 282 Funds in accordance with the terms of the unsigned agreement. *Id.* at 118. Accordingly, Volante's conduct should not be found to be a substitute for a current, signed agreement as the Court in *Moglia* found that the existence of a current, signed agreement is necessary to invoke the District Court's jurisdiction.

Additionally, in attempting to distinguish the instant matter from *Moglia*, the Court below erroneously found that in *Moglia* "[the Second Circuit] held that an unsigned, written agreement between a union and a trust fund did not comply with § 302(c)(5)(B) when the union and the trust fund 'never' had a signed CBA detailing the basis upon which payments were to be made." (App. A at 8a). However, the Second Circuit in *Moglia* did not discuss the signature requirement in conjunction with the prior lack of an agreement. *Id.* at 114-115, 116. *Moglia*, *supra* clearly holds that no "written agreement" under § 302(c)(5)(B) exists without a signature, regardless of whether or not there was a prior, signed agreement. *Id.* at 118.

Moreover, the fact that an expired, signed agreement was in existence has been found to be irrelevant pursuant to the Second Circuit's prior decision in *Derrico*, *supra*, wherein the Court specifically found that ". . . the expired CBA could not support an exercise of jurisdiction under [LMRA] § 301" and that "we conclude that *the CBA must be considered defunct upon its expiration for all purposes* except definition of the status quo." *Id.* at 24, 27. *See also Dietz*, *supra* at 595 ("Section 301 has no application in the absence of a currently effective collective bargaining agreement"); *Hanley v. Herrill Bowling*,

No. 94 Civ. 4611, 1995 WL 428996, *2 (S.D.N.Y. July 20, 1995) (funds have no claim pursuant to an expired agreement under ERISA or the LMRA); *Brown v. Dominic Prisco Transport*, No. 95 Civ. 1121, 1997 WL 1093463, *6-8 (E.D.N.Y. August 16, 1997) (an expired agreement does not satisfy written agreement requirement). Moreover, in *Firesheets*, *supra*, the Fifth Circuit held that a prior, signed agreement's ". . . previous existence does not make a difference . . ." as "[t]he old Agreement was dead." *Id.* at 732.

Moreover, the Local 282 Fund Trust Agreement specifically defines "employer" as "'each employer who has *duly executed* a collective bargaining agreement with the Union.' Trust Agreement at 1, Section 1." (Emphasis added). Further, the Trust Agreement provides that it is "made and entered. . .between Local 282 . . . and Companies who are *signatories* hereto and who are hereinafter collectively referred to as *Employers*." (Emphasis added). Further, the Audit Resolution mandates that solely employers who are *signatories* to the collective bargaining agreement are obligated to be audited, and provides that, "[t]he Trustees construe the 'pertinent books and records of an Employer'. . . to include books and records of any business which is bound by a collective bargaining agreement with Local 282 which requires contributions to any of the Funds ("*Signatory*") . . ." (Emphasis added). Therefore, the Trustees themselves have defined an "Employer" as one who is bound by both the terms of a signed collective bargaining agreement and a signed trust agreement.

Volante has not been a party to a collective bargaining agreement with Local 282 since June 30, 1990. Volante has *never* been a signatory to the Trust Agreement, or any amendments thereto. Thus, pursuant to such agreements' signature requirements, Volante is not bound by such agreements, and the Second Circuit incorrectly held that the District Court had jurisdiction.

With respect to the September 12, 1995 letter from Local 282 which admitted the non-existence of a collective bargaining relationship since June 30, 1990 as Volante had not signed the subsequent agreements, the Court in *Volante* erroneously found that such letter did not demonstrate that Volante was not bound by the unsigned agreements. (App. A at 10a). The Second Circuit concluded that "[t]his letter states, however, only what is undisputed — that the CBAs are unsigned," but failed to recognize that the Funds' own Trust Agreement specifically defines an "employer" who is bound to a collective bargaining agreement as an employer who has *duly executed* a collective bargaining agreement with the Union. (App. A at 10a). Thus, Local 282's letter pointing out that Volante did not have a current, signed agreement demonstrates that the District Court lacked jurisdiction.[4]

Furthermore, the Court in *Volante*, *supra* incorrectly held that Rita Volante's letter to the Trustees wherein she made reference to an unspecified "responsibility to the funds" was sufficient to establish an "adoption" of the collective bargaining agreements. (App. A at 9a). In *Dietz*, *supra*, wherein the alleged contract was based upon an employer's letter, the Second Circuit rejected the proposition that an employer's letter constitutes a "contract covered by § 301" of the LMRA. *Id.* at 592. Moreover, the Court in *Volante* noted that Rita Volante, in such letter, stated that Volante did not have a signed contract with Local 282 since 1989.[5] (App. A at 4a, 10a). However, the Second Circuit

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4. The Funds have never provided *any* evidence that Local 282 believed that they were a party to the 1990-1993 and 1993-1996 agreements. By virtue of Local 282's letter dated September 12, 1995, there is evidence to the contrary. The Second Circuit's assertion that the letter only reiterates the fact that the agreements were unsigned is illogical. Had Local 282 believed that valid agreements existed, they would have had no incentive to request that Volante execute the agreements.

5. The agreement expired on June 30, 1990.

erroneously concluded that Rita Volante's notation of same did not "undermine the evidence of appellant's intent to adopt the unsigned CBAs but points out only the undisputed fact that the two CBAs effective from July 1, 1990 through June 30, 1996 were not signed by appellant." (App. A at 10a). As noted above, the Funds' own Trust Agreement specifically defines an employer who is bound to a collective bargaining agreement as an employer who has *duly executed* a collective bargaining agreement with the Union. Thus, pursuant to the agreements' signature requirements, Rita Volante's letter stating that Volante did not have a current, signed agreement demonstrates that Volante did not intend to adopt the collective bargaining agreements and that the District Court lacked jurisdiction.

Thus, the Court in *Volante* erroneously failed to find that the District Court lacks subject matter jurisdiction to determine whether an employer has an obligation to contribute to a fund subsequent to the expiration of a current, signed collective bargaining agreement. This decision causes there to exist a conflict with regard such issue within the Second Circuit, and between the various Circuits.

As the Second Circuit's decisions in *Moglia*, *Benson*, *Derrico*, and *Dietz*, *supra*, as well as the Fifth Circuit's decision in *Firesheets*, *supra*, follow *Advanced Lightweight* and hold that the District Court lacks jurisdiction over claims for contributions allegedly due and owing pursuant to ERISA and the LMRA in the absence of a current, signed collective bargaining agreement, the Second Circuit's decision in *Volante*, holding that a signature may not be necessary, has caused a conflict within the Second Circuit, and between the Second Circuit and the Fifth Circuit, which must be addressed and reconciled. Moreover, given the Second and Fifth Circuits' aforementioned decisions in contrast to the Seventh Circuit's decisions in *Moriarty* and *Gariup*, *supra*, holding that a signed agreement is not necessary in order to invoke the District Court's

jurisdiction, the conflict between the Second, Fifth, and Seventh Circuits must be resolved.

II.

THE PETITION SHOULD BE GRANTED AS THE *VOLANTE* DECISION IS IN DIRECT CONFLICT WITH SECOND, THIRD, FIFTH, SIXTH, SEVENTH, AND NINTH CIRCUIT PRECEDENT HOLDING THAT THE DISTRICT COURT LACKS JURISDICTION PURSUANT TO ERISA AND THE LMRA AFTER THE EXPIRATION OF A CURRENT COLLECTIVE BARGAINING AGREEMENT AND THAT THERE DOES NOT EXIST A FEDERAL COMMON LAW CAUSE OF ACTION FOR BREACH OF AN IMPLIED COLLECTIVE BARGAINING AGREEMENT

As set forth above, the Court in *Volante*, *supra* erroneously declined to follow *Advanced Lightweight*, *supra*, wherein the Supreme Court held that District Courts lack subject matter jurisdiction over claims for contributions allegedly due for any period subsequent to the expiration of a collective bargaining agreement, and that the NLRB has exclusive subject matter jurisdiction over disputes regarding whether an employer has a continuing obligation to make post-contract contributions. *Id.* at 549. As set forth herein, the Second Circuit has followed *Advanced Lightweight*. *Dietz*, *supra* at 597; *Derrico*, *supra* at 24. However, the Second Circuit in *Volante* failed to follow the *Dietz* and *Derrico* decisions, both holding that a claim for post-contract contributions cannot create a federal common law claim for breach of implied contract. *Dietz*, *supra* at 597-598; *Derrico*, *supra* at 25. Accordingly, the *Volante* decision, which erroneously holds that the District Court may have jurisdiction over claims for contributions subsequent to the expiration of a collective bargaining agreement, causes there to exist a conflict regarding such issue within the Second Circuit, and between the Second Circuit and other Circuits.

Derrico, *supra*, holds that a claim for breach of an implied contract is preempted by the NLRA and that a contrary result would limit the parties' post-expiration options of resorting to "economic weapons" when the parties reached an impasse in negotiations. *Id.* at 29. The Court held that "[t]he possibility that a term of an expired CBA might become an 'implied' contract . . .would tie the parties' hands in a manner inimical to this facet of the NLRA's collective bargaining process." *Id.* As the NLRA prohibits an employer from discontinuing contributions to a fund after the expiration of an agreement unless the employer has bargained to impasse with the union, *Derrico* found that an implied contract could not be derived from the post-expiration maintenance of the status quo required by the NLRA. *Id.*

In *Derrico*, the Court found that

> [the] [e]xpiration of a CBA plainly works a significant change in the parties' relationship . . . [and] the prospect of that change . . . provide[s] the parties with incentives to negotiate. To allow a CBA provision to linger on after the contract's expiration in the form of an implied contract would dilute these effects. Trivializing the parties' agreed termination mechanism in this manner would also trivialize the very freedom of contract that is a fundamental policy of the NLRA . . .

Derrico, *supra* at 29; *Prisco*, *supra* at *7.

The Second Circuit in *Dietz*, *supra*, held that a post-expiration denial of benefits cannot create a federal common law claim for breach of implied contract. *Dietz*, *supra* at 597-598; *Prisco*, *supra* at *7. *Dietz*, *supra* found that "[t]o recognize appellants' post-expiration breach of implied contract claim under federal common law would usurp the role of the NLRB in resolving disputes arising under § 8(a)(5)." *Id.* at 598.

Moreover, in *Prisco*, *supra*, the District Court rejected the Local 282 Funds' contention that the Defendants had adopted the unsigned agreements through a course of conduct by contributing to the Funds, submitting remittance reports from 1988 to 1993, and paying scale wages. *Id.* at *6. *Prisco* followed *Dietz* and *Derrico* in determining that there is no federal common law cause of action for implied contract. The Court in *Prisco* rejected the out-of-circuit line of cases cited by the Funds for the proposition that an employer may bind itself to an agreement through its course of conduct and held that "[t]he out of circuit cases do not persuade the court." *Id.* at *8.

In concluding that Volante was bound to the 1990-1993 and 1993-1996 collective bargaining agreements by adoption of contract because Volante continued to submit remittance reports, the Court in *Volante* ignored *Smith v. Candler Coffee Corporation*, No. 95 Civ. 10956, 1996 WL 434554 (S.D.N.Y. August 2, 1996), wherein the District Court noted that the NLRA prohibits an employer from discontinuing contributions to a fund after the expiration of a collective bargaining agreement, unless the employer has bargained to impasse with the union. *Id* at *3. *Candler* found that

> [t]o hold . . . that performance of those statutory duties creates an implied contract would require an employer either to violate the law by halting contributions, or to create an implied contract by continuing those contributions. That Hobson's choice is contrary to the fundamental principles of collective bargaining and freedom of contract.

Id. at *4. *Candler*, citing *Derrico* and *Dietz*, noted that for this reason, the Second Circuit held that a claim of implied contract is preempted by ERISA and that post-expiration maintenance of the status quo cannot create an implied contract under federal common law. *Id.*

In *Moglia*, the Second Circuit rejected the adoption by conduct theory. *Id.* at 118. The Court found that an employer's adherence to the terms of an unexecuted Local 282 agreement, including the payment of contributions and scale wages, did not amount to an adoption of the agreement. *Id.* at 118.[6]

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6. Moreover, the District Courts within the Second Circuit have held that District Courts do not have jurisdiction over claims for post-contract contributions. In *Candler Coffee*, *supra*, the Court followed *Advanced Lightweight* and noted that, "federal court jurisdiction exists under ERISA § 502 only when the employer's duty to make payments to a pension fund derives from a contract" and that "the fiduciary of a fund may seek federal court relief only for 'the collection of promised contributions.' " *Candler*, *supra* at *2. "ERISA does not confer jurisdiction on the district courts to determine whether an employer's refusal to make contributions to a protected plan violates the duty to bargain in good faith; those issues are within the exclusive competence of the NLRB." *Id.* Moreover, in *Prisco*, *supra*, the Court, following *Advanced Lightweight*, held that "employer liability under ERISA is limited to 'promised contributions' " and declined to find a cause of action in the absence of a current collective bargaining agreement. *Prisco*, *supra* at *8.

Further, in *Hanley v. Orient Beach Club, Inc.*, No. 96 Civ. 4478, 1998 WL 65990 (S.D.N.Y. February 18, 1998), the District Court followed *Advanced Lightweight* and held that the NLRB is vested with exclusive jurisdiction over actions to collect contributions during the post collective bargaining period. *Orient Beach*, *supra* at *6. The Court, citing *Alston v. Quik Park Garage Corp.*, No. 97 Civ. 0067, 1997 WL 795790 (S.D.N.Y. December 30, 1997), found that

> employers do not have a duty under ERISA to make trust fund contributions after the expiration of the collective bargaining agreement . . . Thus, if a trust fund wishes to commence litigation to recover unpaid contributions for a period of time not covered by any collective bargaining agreement, the action must be brought before the NLRB . . .

Orient Beach, *supra* at *6. The Court, citing *Mason Tenders District Council Welfare Fund v. ITRI Brick and Concrete*, No. 96 Civ. 6754,

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1997 WL 678164 at *3-4 & n.4 (S.D.N.Y. October 31, 1997), found that the " 'NLRB has exclusive jurisdiction to determine if an employer's conduct constitutes an unfair labor practice,' including where [an] employer stops post-CBA contributions to a pension fund before impasse." *Orient Beach*, *supra* at *6.

Moreover, in *Herrill*, *supra*, the Court, citing *Dietz* and *Advanced Lightweight*, held that employer liability pursuant to § 515 of ERISA and § 301 of the LMRA is limited to "promised contributions" under a current agreement and that the funds could not bring a claim for contributions after the expiration of the agreement. *Herrill*, *supra* at *2. The Court found that the Funds' sole remedy was the NLRA § 8(a)(5) and that the NLRB had exclusive jurisdiction over this claim. *Id.* at *4.

In *Associated Wrecking, Inc. v. Local 95 Pension Fund*, No. 92 Civ. 1841, 1994 WL 118987 (S.D.N.Y. March 31, 1994), the Court held that an alleged failure to make contributions after the expiration of a collective bargaining agreement does not state a cause of action under § 301 of the LMRA, but may state a claim of an unfair labor practice, and would fall under the jurisdiction of the NLRB. *Id.* at *2.

In *Wenzel v. Edison Parking*, No. 94 Civ. 1971, 1995 WL 135553, *2 (S.D.N.Y. March 29, 1995), the Court held that district courts lack jurisdiction to determine whether an employer's unilateral decision to refuse to make post-contract contributions violates the NLRA. *Id.* at *2.

In *Wenzel v. Jeff Parking*, Nos. 93 Civ. 5071, 94 Civ. 0831, 1995 WL 258055 (S.D.N.Y. May 3, 1995), the Court, citing *Moglia*, noted that LMRA § 302 provides that an employer may only make contributions where "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." *Jeff Parking*, *supra* at *2. The court determined that because there was no current agreement in existence, a written agreement, pursuant to § 302 of the LMRA, did not exist. *Id.* at *4. The District Court, following *Advanced Lightweight*, found that "this Court could have no authority to hear such a case." *Jeff Parking*, *supra* at *4, n.6.

(Cont'd)

Thus, the Court in *Volante* was in error in affirming the District Court's determination that Volante adopted the 1990-1993 and 1993-1996 Local 282 agreements through its course of conduct.

Further, the Second Circuit's citation in *Volante* to *Baskin v. Hawley*, 807 F.2d 1120 (2nd Cir. 1986) for the proposition that District Courts have jurisdiction over cases wherein agreements are allegedly "adopted" is misplaced. The *Baskin* decision upheld a "jury verdict premised on [a] finding that [an] employer's conduct manifested adoption of the CBA." (App. A at 9a). Such decision makes no reference to ERISA, the LMRA, or the NLRA in its discussion pertaining to the alleged adoption of the agreement. *Id.* at 1128-1129. Moreover, the jury found that the employer was bound to the agreement as a *signatory* and by demonstrating a clear intent to be bound by it in its *entirety*. *Id.* at 1127-1129. Significantly, the *Baskin* decision predates the *Dietz* and *Derrico* decisions and clearly conflicts with the Second Circuit's later holdings in such cases that there exists no federal common law cause of action for breach of an implied collective bargaining agreement. Thus, the *Baskin* case does not support the Second Circuit's conclusion in *Volante* that the District Court has jurisdiction wherein an unexecuted agreement is allegedly "adopted."

Accordingly, as the Second Circuit's decisions in *Dietz*, *Derrico*, and *Moglia* hold that the there is no federal cause of

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In *Brown v. J.F.H. Mak Trucking, Inc.*, No. 95 Civ. 2118, 1999 WL 1057274 (E.D.N.Y. November 8, 1999), which was decided subsequent to the Second Circuit's decision in *Volante*, the District Court followed *Advanced Lightweight* in holding that it lacked jurisdiction over the Local 282 Funds' claims against an employer for a time period subsequent to the employer's last signed collective bargaining agreement with Local 282. *J.F.H. Mak*, *supra* at *3. The District Court held that a fund may only commence an action in federal court pursuant to ERISA to collect "promised contributions" which are specified in a current, signed collective bargaining agreement. *Id.* at *2-3.

action for breach of an implied collective bargaining agreement and that employers may not adopt collective bargaining agreements through their conduct, the *Volante* decision has caused a conflict within the Second Circuit which must be addressed and reconciled.

Moreover, due to the Court's *Volante* decision, declining to hold that the NLRB has exclusive jurisdiction over claims for contributions allegedly due for a period after the expiration of a collective bargaining agreement, there now exists a conflict regarding such issue between the Circuits. Other circuits have held that the District Court lacks jurisdiction over claims for contributions for a period after the expiration of an agreement and have declined to find a cause of action for adoption of a subsequent unexecuted contract.

In *Empire Excavating v. American Arbitration Association*, 693 F. Supp 1557 (M.D. Pa. 1988), *aff'd without op.*, 866 F.2d 1409 (3rd Cir. 1988), the District Court held that "the existence of a collective bargaining agreement between the parties to [the] action is critical to the court's jurisdiction" and that "[a]bsent a contract, jurisdiction over the relations between an employer and the representative of its employees is vested in the NLRB . . ." *Id.* at 1560, 1563.

In *UA Local 343 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industries v. Nor-Cal Plumbing*, 48 F.3d 1465, 1470-1471 (9th Cir. 1995), the Court found that ERISA provides no jurisdiction to enforce an employer's post-contract obligation to contribute under the NLRA. *See also Collins v. Pension and Insurance Committee of the Southern California Rock Products and Ready Mixed Concrete Associations*, 144 F.3d 1279, 1283-1284 (9th Cir. 1998) (after the expiration of an agreement, a fund has no claim under ERISA but must file an unfair labor practice charge with the NLRB).

In *International Association of Bridge, Structural and Ornamental Iron Workers v. SR Industries*, No. 90 Civ. 1071, 940 F.2d 665, 1991 WL 151901, *4 (7th Cir. 1991), the Court found that the NLRB has exclusive jurisdiction over claims for contributions following the expiration of a collective bargaining agreement.

In *Lattin v. Kurdziel Iron of Rothbury, Inc.*, No. 96 Civ. 2558, 145 F.3d 1332, 1998 WL 252743, *1 (6th Cir. 1998), the Court found that an action to enforce the terms of an expired agreement is preempted by the primary jurisdiction of the NLRB.

In *Firesheets, supra*, the Fifth Circuit held that the continued payment of contributions and submission of remittance reports for ten years does not evidence an intent to be bound by the terms of a subsequent unexecuted agreement. *Id.* at 732.

Accordingly, the conflict between the Second Circuit's decision in *Volante* and the aforementioned Third, Fifth, Sixth, Seventh, and Ninth Circuits' decisions must be examined and resolved, especially because the Second Circuit's decisions in *Dietz* and *Derrico* are consistent with the other Circuits' decisions. Clearly, the majority of cases have held that District Courts lack jurisdiction over claims for post-contract contributions and have declined to find a cause of action for adoption of an unexecuted agreement.

III.

THE PETITION SHOULD BE GRANTED AS THE *VOLANTE* DECISION, HOLDING THAT VOLANTE ADOPTED THE TERMS OF THE UNEXECUTED COLLECTIVE BARGAINING AGREEMENTS, IS UNSUPPORTED BY THE FACTS AND IS IN DIRECT CONFLICT WITH SECOND, THIRD, AND FIFTH CIRCUIT PRECEDENT HOLDING THAT SUCH CONDUCT DOES NOT AMOUNT TO THE ADOPTION OF A COLLECTIVE BARGAINING AGREEMENT

A grant of summary judgment is proper only if there is no genuine issue of material fact. *Hayes v. New York City Department of Corrections*, 84 F.3d 614, 618 (2nd Cir. 1996). *Volante* improperly holds that the Funds demonstrated the absence of a genuine issue of material fact as to whether Volante "adopted" the unsigned collective bargaining agreements. At the outset, this Circuit has already decided that an employer may not "adopt" a collective bargaining through its conduct and that a federal claim for breach of an implied contract is preempted by the NLRA. However, even if conduct was a basis for finding an adoption of contract, Volante's conduct did not indicate an intent to be bound by the unsigned agreements.

The Second Circuit's reliance on out-of-circuit caselaw such as *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) and *Trustees of Atlanta Iron Workers v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459-60 (11th Cir. 1983) in support of their holding that Volante's conduct amounted to an adoption of the agreement is in direct conflict with later precedent within the Second Circuit and other Circuits holding that an employer's submission of remittance reports, payment of union wages, submission to an audit, and/or employment of union members does not evidence adoption of an unexecuted agreement.

The Court in *Volante* erroneously concluded that because Volante submitted remittance reports for sixty one months, which stated that that they were submitted in accordance with the terms of the standard Industry Agreement with Local 282, such conduct evidenced an adoption of contract. In both *Dietz* and *Derrico*, the Second Circuit held that post-expiration contributions do not create a claim for breach of implied contract. *Dietz*, *supra* at 597-598; *Derrico*, *supra* at 29. Significantly, in *Prisco*, *supra*, following the *Dietz* and *Derrico* decisions' rejection of the theory of breach of an implied contract, the District Court found that the defendants' submission of monthly remittance reports to the Local 282 Funds for over five consecutive years stating "HOURS PAID FOR . . . In Accordance with the terms of the standard Industry Agreement with Local 282, I.B.T." did *not* amount to an adoption of the unexecuted collective bargaining agreements. *Id.* at *6-7.[7] Moreover, in *Moglia*, the Second Circuit found that the payment of contributions does not amount to adoption of the current unsigned Local 282 agreement. *Id.* at 118.

Further, while the unexecuted collective bargaining agreements mandate that contributions must be made for all hours worked, for all employees, Volante merely made voluntary, partial contributions to the Funds. In *Prisco*, *supra*, the District Court specifically held that making "periodic payments to the Funds constitute[s] a unilateral change in the terms of

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7. In *Empire Excavating*, *supra*, after the expiration of a signed agreement, the employer completed a reporting form stating that contributions were being made in conformity with the collective bargaining agreement. *Id.* at 1562. The Court found that this conduct did not evidence adoption of the unexecuted agreement. *Id.* at 1561-62. Further, in *Firesheets*, *supra*, after the expiration of a signed agreement, the employer submitted remittance reports stating that it was bound to the subsequent unsigned agreement. *Id.* at 731. The Court found that this did not evidence adoption of the unexecuted agreement. *Id.*

employment. . ." and found no adoption of the unsigned collective bargaining agreement. *Id.* at 7.[8]

Volante erroneously holds that Volante's alleged payment of union wages evidenced an adoption of the collective bargaining agreements. In *Moglia*, the Second Circuit held that the payment of Local 282 scale wages does not amount to the adoption of the current unsigned agreement. *Id.* at 118. Moreover, in *Prisco*, the District Court found that the payment of Local 282 scale wages does not amount to an implied contract. Id. at *6-7.[9]

The Court in *Volante* erroneously concluded that the continued employment of an employee who was not a Local 282 member did not create a genuine issue of material fact with regard to the Funds' claim that Volante "adopted" the unexecuted agreements. Volante did not exclusively employ union members as Local 282 rejected the membership application of a Volante driver because Volante had not signed the 1990-1993 and 1993-1996 agreements. Such letter unambiguously informed Volante that Local 282 did not recognize the existence of any agreement during these periods. Thus, such circumstances demonstrate that neither Volante nor Local 282 intended to "adopt" such unsigned agreements.

Moreover, *Prisco*, *supra* found that the employer's conduct did not evidence adoption of the unsigned agreement wherein the employer employed Local 282 members subsequent to the expiration of a collective bargaining agreement. *Id.* at *6-7.[10]

8. In *Firesheets*, *supra*, the Fifth Circuit found that the employer's "voluntary" post-contract contributions did not bind the employer to the subsequent unsigned agreement. *Id.* at 731.

9. It also must be noted that Volante paid a wage rate based upon information provided by another contractor for whom Volante did trucking, and did not rely on the unsigned agreements as the source from which Volante obtained the wage rate.

10. In *Empire Excavating*, *supra*, wherein the employer continued to employ union members after the expiration of an agreement, the (Cont'd)

Volante, *supra* erroneously holds that the submission of Volante to an audit evidenced an adoption of the unexecuted agreements. As Volante was still a signatory to an agreement with Local 282 through June 30, 1990, Volante submitted to an audit. The audit ultimately encompassed the time period of May 30, 1990 through September, 30, 1993. As Volante was a signatory during the one month period of May 30, 1990 through June 30, 1990, Volante was obligated to submit to an audit. Thus, Volante's submission to an audit does not evidence adoption of the unsigned agreements.

The *Volante* decision incorrectly found that Rita Volante's letter to the Funds was sufficient "absent contrary evidence" to establish Volante's intent to adopt the unsigned collective bargaining agreements. (App. A at 7a). As set forth herein, Volante has presented evidence contrary to an intent to adopt the agreements; the caselaw within the Second Circuit holds that Volante's alleged conduct does not evidence adoption of the unsigned agreements; and the *Dietz* decision holds that such letter does not constitute a collective bargaining agreement. *Id.* at 592.

Thus, based upon the foregoing, *Volante* erroneously held that there was an absence of a genuine issue of material fact as to whether Volante "adopted" the unexecuted agreements.

Thus, the *Volante* decision is in direct conflict with Second Circuit precedent, and precedent from the Third and Fifth Circuits, holding that conduct of the type which the Funds allege Volante was engaged does not evidence an adoption of unsigned agreements. Such conflict should be resolved.

(Cont'd)
Court found that this conduct did not bind the employer to the terms of a subsequent agreement. *Id.* at 1561-62.

CONCLUSION

The instant matter presents questions of exceptional and ongoing material importance as such issues effect the application of ERISA, the LMRA, and the NLRA to collective bargaining issues and benefit fund contribution issues nationwide. By granting this petition for certiorari, this Court will have the opportunity to determine, so as to promote consistency among the Circuits, the issues of whether a current, executed collective bargaining agreement is critical to the District Court's jurisdiction; whether there exists a cause of action for breach of an implied collective bargaining agreement or an adopted collective bargaining agreement; and whether certain conduct of an employer is tantamount to an adoption of an unsigned agreement.

Accordingly, Petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED OCTOBER 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999
(Argued: September 24, 1999 Decided: October 8, 1999)
Docket No. 99-7109

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL, and ANIELLO MADONNA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds,

Plaintiffs-Appellees,

— v. —

C. VOLANTE CORP.,

Defendant-Appellant.

Before:

WINTER, *Chief Judge*,
KEARSE and MCLAUGHLIN, *Circuit Judges*.

* * *

Appendix A

WINTER, *Chief Judge*:

C. Volante Corp. appeals from Judge Gershon's orders granting appellees' motion for summary judgment and awarding damages. Appellant argues that: (i) the district court lacked subject matter jurisdiction over appellees' claims because they arose from an alleged breach of unsigned collective bargaining agreements, (ii) the district court erred in determining that there were no triable issues as to whether appellant manifested its intent to adopt unsigned collective bargaining agreements, and (iii) the district court made several erroneous findings in connection with its damages award. We affirm.

BACKGROUND

Appellant is a New York truck rental company. Appellees are the Trustees of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds (the "Fund"), which were established pursuant to collective bargaining agreements ("CBA") between Building Material Local 282 of the International Brotherhood of Teamsters (the "Union") and various employers.

Appellant was a signatory to a CBA in effect from July 1, 1987 to June 30, 1990. It did not, however, sign two subsequent CBAs, governing the period July 1, 1990 to June 30, 1996. Pursuant to all the CBAs, employers agree to contribute a fixed dollar amount to the Fund contingent upon the number of hours its employees work.

Appendix A

Although appellant did not sign the CBAs effective from July 1, 1990 to June 30, 1996, it submitted monthly remittance reports during this period. These sixty-one reports detailed hours worked by appellant's employees and its contributions to the Fund as determined by the hours worked. Each report was accompanied by the payment calculated in the report. Each of the reports was signed by appellant's then-Chief Executive Officer as "Pres.," and most of them contained a typewritten phrase indicating it was submitted "[i]n Accordance with the terms of the standard Industry Agreement with Local 282, I.B.T."

The parties do not dispute that appellant's payments to the Fund accorded with the rates set forth in the operative CBA. Rather, the Trustees' claim stems from appellant's alleged failure to make payments to the Fund for all of its employees.

The Trust Agreement, incorporated by reference in the CBAs, provides for periodic auditing of an employer's records concerning payments to the Fund. During November and December, 1993, the Trustees conducted an audit of appellant's records covering the period from May 30, 1990 through September 30, 1993. Appellant cooperated in this audit even though most of it concerned months during which appellant was not a signatory to a CBA. The Trustees' resulting audit report showed that appellant owed more than $78,000.00 to the Fund.

After receiving the audit report, Rita Volante wrote to the Trustees on appellant's behalf. She framed the "main issue" as whether appellant owed contributions for work done

by "outside trucks" and noted that "we were under the assumption that they were paying their own union benefits." Volante did not dispute that appellant had an obligation to make payments to the Fund or that it owed contributions for the outside work. Instead, she expressly acknowledged "a responsibility to the funds" that "[w]e are not skirting." Nevertheless, Volante offered only $35,000.00 as the amount appellant could afford and noted, as a thought for consideration, that appellant had not signed a CBA since 1989.

The Trustees rejected appellant's offer and brought the instant suit. Appellant thereafter moved to dismiss the action for lack of subject matter jurisdiction, and appellee moved for summary judgment. Judge Gershon denied appellant's motion to dismiss, granted appellees' summary judgment motion, and referred the case to Magistrate Judge Pohorelsky for an inquest. In a December 22, 1998 Memorandum and Order, Judge Gershon adopted Magistrate Judge Pohorelsky's recommendation to award appellees $248,514.03 in damages, interest, attorney's fees and costs. This appeal followed.

DISCUSSION

a) *Subject Matter Jurisdiction*

Relying on *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), appellant argues that the district court lacked subject matter jurisdiction over the Trustees' claims for benefit fund contributions owing on work performed during a period when

appellant was not bound by a collective bargaining agreement. We disagree.

The Trustees brought the instant claims pursuant to Sections 502(g)(2) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(g)(2), 1145, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. In *Advanced Lightweight*, the Supreme Court held that ERISA Sections 502(g)(2) and 515 do not confer subject matter jurisdiction over claims "to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the [National Labor Relations Act]." 484 U.S. at 549. According to the Court, Sections 502(g)(2) and 515 confer jurisdiction only over claims for "promised contributions," not over unfair labor practice claims that an employer has refused to bargain in good faith by failing to make post-contract benefit plan contributions before negotiations for a new contract reached an impasse. *See Advanced Lightweight*, 484 U.S. at 548-49. The decision, therefore, stands only for the unremarkable proposition that the National Labor Relations Board generally has exclusive jurisdiction over unfair labor practice claims. *See NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that employer's failure to honor terms of expired CBA during negotiations on new CBA constitutes unfair labor practice); *Advanced Lightweight*, 484 U.S. at 543 n.4 ("As a general rule, federal courts do not have jurisdiction over" unfair labor practice claims.) (internal quotation marks omitted); *but see id.* (noting that federal courts have jurisdiction over unfair labor practice claims that are "collateral" to claims over which there is an independent basis for jurisdiction).

Although it is true that the Trustees' claims arise from appellant's alleged failure to contribute to the Fund after the signed CBA expired, this does not render them *per se* unfair labor practice claims over which the district court lacks jurisdiction under *Advanced Lightweight*. The Trustees are not arguing that appellant has unlawfully refused to bargain by making unilateral changes in working conditions before reaching an impasse over a new CBA. Rather, the Trustees claim that appellant promised to contribute to the Fund by adopting the two CBAs that it never signed. Appellees' claims are thus clearly for "contributions [owing] in accordance with the terms and conditions of . . . [a collective bargaining] agreement," 29 U.S.C. § 1145, and "violation[s] of contracts between an employer and a labor organization," 29 U.S.C. § 185(a), over which the district court has jurisdiction. *See Advanced Lightweight*, 484 U.S. at 547 ("The liability created by § 515 may be enforced by the trustees of a plan by bringing an action in federal district court . . . ."); 29 U.S.C. § 185(a).

b) *Summary Judgment*

Appellant next argues that the district court improperly granted summary judgment because there are genuine issues of fact as to whether appellant adopted the two unsigned CBAs. We disagree.

We review the grant of summary judgment *de novo*. *See Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202-03 (2d Cir. 1995). A moving party is entitled to summary judgment when, after reviewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998). A dispute is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Trustees satisfied their initial burden to demonstrate the absence of a genuine issue of material fact as to whether appellant adopted the two unsigned CBAs. *See FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (noting that "[a] movant for summary judgment 'always bears' . . . 'the initial responsibility of . . . demonstrat[ing] the absence of a genuine issue of material fact' ") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The sixty-one remittance reports — most of which were expressly submitted "[i]n accordance with the terms of" the CBAs — appellant's cooperation with the audit, its payment of union wages to employees, and Volante's letter to the Trustees acknowledging appellant's "responsibility to the funds," are sufficient, absent contrary evidence, to establish as a matter of law appellant's intent to adopt the two unsigned CBAs. *See, e.g., Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) (granting summary judgment to trustee of funds on claim that employer breached adopted agreement; noting, among other things, that employer "paid the union scale . . . and paid (some) pension and welfare contributions"); *Trustees of Atlanta Iron Workers, Local 387 Pension Fund v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459-60 (11th Cir. 1983) (per curiam) (upholding finding that employer adopted CBA and agreement to contribute to benefit fund; noting employer's payment of union wages, submission of benefit reports, and accession to audit).

Appellant argues that the unsigned CBAs do not satisfy the ERISA Section 302(c)(5)(B) requirement that payments to a trust fund be made pursuant to a "written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). According to appellant, it did not make a "written agreement" to contribute to the Fund after June 30, 1990 because it did not sign the two subsequent CBAs. Appellant's argument, however, overlooks the statutory language. Section 302(c)(5)(B) does not require that an agreement be signed, only that it be "written" and set forth "a detailed basis on which . . . payments are to be made" to a trust fund. *Id.* Accordingly, an unsigned, written agreement satisfies Section 302(c)(5)(B)'s "written agreement" requirement.[1] *See Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir. 1985) (concluding that a "signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B); rather section 302(c)(5)(B) requires only a 'written agreement' ").

Because there is no dispute that the unsigned CBAs set forth a sufficiently detailed basis on which the payments were

---

1. Our decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), is not to the contrary. There, we held that an unsigned, written agreement between a union and a trust fund did not comply with Section 302(c)(5)(B) when the union and the trust fund "never" had a signed CBA detailing the basis upon which payments were to be made. 403 F.2d at 114, 115. We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, on the facts of that case, the employer "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." *Id.* at 118. We did not, however, graft a signature requirement onto Section 302(c)(5)(B). Unlike the employer in *Moglia*, appellant's conduct manifested an intent to adopt the terms of the unsigned CBAs.

to be made, the only question is whether appellant's conduct manifested an intent to adopt, or agree to, the unsigned CBAs. 29 U.S.C. § 186(c)(5)(B); *see also Baskin v. Hawley*, 807 F.2d 1120, 1128-29 (2d Cir. 1986) (upholding jury verdict premised on finding that employer's conduct manifested adoption of CBA); *Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("Both § 302(c)(5)(B) and general principles of contract law permit an employer to adopt a collective bargaining agreement by a course of conduct plus a writing . . . a signature at the bottom of the collective bargaining agreement itself is unnecessary."); *Southern Stress Wire Corp.*, 724 F.2d at 1459-60.

As noted above, the Trustees' proffer, absent rebuttal, suffices to show adoption of the CBAs as a matter of law. In response, appellant contends, first, that it did not actually comply with the CBA provisions requiring it to contribute to the Fund. However, appellant concedes that, for the period covered by the audit, it contributed to the Fund at the rate prescribed by the unsigned CBAs. Even with regard to contributions for the "outside" drivers it hired — the issue in this case — Volante's letter to the Trustees manifests appellant's understanding that it was bound to contribute to the Fund on behalf of these employees. The Volante letter thus not only fails to create a genuine issue as to liability, but actually tends to establish adoption of the unsigned CBAs.

Appellant also relies on an affidavit stating that it did not pay its employees' wages based on the CBA but on information supplied to it by one of its customers. There is no dispute, however, that appellant paid its employees the

wage scales set forth in the unsigned CBAs. Similarly, appellant's argument on appeal that it did not post a bond in the amount required by the CBAs is unsupported by any evidence. Neither of these arguments therefore suffices to create a genuine issue of material fact.

Finally, appellant points to a letter from the Union requesting that appellant sign the 1990-1993 and 1993-1996 CBAs. The letter began by stating "we are aware that your dues and benefit contributions are paid timely and to date" but informed appellant that it could not process a Union book for one of appellant's new employees until the CBAs were signed. This letter states, however, only what is undisputed — that the CBAs are unsigned. It does not undercut appellant's conduct indicating that it intended to be bound by the unsigned CBAs.[2]

Moreover, that appellant subsequently hired the employee whom the Union declined to admit as a member does not, in these circumstances, create a genuine issue of material fact. Appellant's hiring of this non-Union employee may have breached the CBAs, but appellant proceeded to contribute to the Fund on behalf of this employee, thus further manifesting its intent to be bound by the CBAs' trust fund provisions.

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2. Similarly, Volante's letter to the Trustees, in which she noted as a "thought[ ] for . . . consideration" that appellant had not been a signatory to a CBA since 1989, does not undermine the evidence of appellant's intent to adopt the unsigned CBAs but points out only the undisputed fact that the two CBAs effective from July 1, 1990 to June 30, 1996 were not signed by appellant.

Appellant has not, therefore, demonstrated the existence of a genuine issue of material fact as to whether its conduct manifested an intent to adopt the unsigned CBAs.

c) *Damages*

Having carefully reviewed the record at the inquest, Magistrate Judge Pohorelsky's final report and recommendation, and Judge Gershon's decision adopting that report, we find no clear error in the district court's findings in connection with its damages award.

Appellant makes three principal challenges to the district court's findings in connection with its damages award, which we address in turn. We review these findings for clear error. *See* Fed. R. Civ. P. 52(a); *United States Naval Inst. v. Charter Communications, Inc.*, 936 F.2d 692, 697 (2d Cir. 1991).

First, appellant argues that the district court erred in crediting the auditor's assumptions that work performed by two employees in 1992 was "covered work" — work for which appellant owed contributions to the Fund. The district court was warranted in crediting this assumption, however, because appellant made contributions for these same employees during 1993 and the employees' wages for this work in 1992 were comparable to their 1993 wages.

Second, appellant argues that the district court should have discredited the auditor's testimony that appellant was not "double billed" for these employees' work. Appellant points to the auditor's testimony that he could not be sure, at the time of the hearing, whether he double billed hours. In this same hearing, however, the auditor testified that his

recollection was that, at the time he prepared the report, he deducted any hours for which appellant had already contributed to the Fund in accordance with the auditor's usual practice. The district court did not clearly err in finding this recollection credible.

Finally, appellant argues that the auditor unreasonably considered subcontracted employees' work as covered work, even though the CBA requires the Union to give an employer notice of its obligation to make contributions to the Fund for subcontracted employees' work. The problem with this argument is that it is only an argument, not supported by any evidence that the employees at issue were actually subcontracted. Moreover, appellant's argument is based on a selective reading of the CBA. The relevant provision requires, first, that appellant notify the Union "on a weekly basis . . . of the hours worked by" outside drivers. If the outside drivers' employer does not make the requisite contributions to the Fund, then the Union is required to notify appellant of its obligation to contribute on the outside drivers' behalf. Appellant presented no evidence at the damages hearing that it notified the Union of its employment of outside drivers. Appellant cannot, accordingly, invoke the protection of the above-quoted CBA provision, and the district court did not err in crediting the auditor's testimony that appellant owed contributions for these employees' work.

Accordingly, we affirm the district court's damages award.

CONCLUSION

We therefore affirm.

APPENDIX B — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED AND FILED JANUARY 20, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

95-CV-1406 (NG)

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL and ANIELLO MADONNA as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Plaintiffs,

– against –

C. VOLANTE CORP.

Defendant.

AMENDED FINAL JUDGMENT

A memorandum and order of the Honorable Nina Gershon, United States District Judge, having been filed on December 22, 1998; having previously granted summary judgment on July 30, 1997, as to liability in favor of the plaintiff Trustees; now adopting in its entirety the September 1, 1998 Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky as to damages, interest and attorneys' fees, and entering judgment in the following amounts:

Appendix B

Past due contributions	$ 78,183.87
Interest (through June 1998)	$ 67,770.08
Liquidated Damages	$ 67,770.08
Attorneys' Fees	$ 39,670.00
Costs	$ 120.00
TOTAL	$248,514.03

plus additional interest on past due contributions of $975.76 for each month from June 1998 through December 1998 for a sum of $6,830.32; plus $975.76 in liquidated damages for each month from and after June 1998 through December 1998 for a sum of $6,830.32; resulting in a sum of $13,660.64; for a TOTAL AWARD of $262.174.67; it is

ORDERED and ADJUDGED that the September 1, 1998 Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky is adopted in its entirety; and, that judgment is entered in favor of plaintiffs and against defendant, C. Volante Corp., as follows:

Past due contributions	$73,183.87
Interest (through June 1998)	$76,770.08
Liquidated Damages	$67,770.08
Attorneys Fees	$39,670.00
Costs	$ 120.00

plus additional interest on past due contributions of $975.76 for each month from June 1998 through December 1998 for a sum of $6,830.32; plus $975.76 in liquidated damages for each month from and after June 1998 through December 1998 for a sum of $6,830.32; resulting in a sum of $13,660.64 for a TOTAL AWARD of $262,174.67.

Appendix B

DATED: Brooklyn, New York
January 20, 1999

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
CLERK OF COURT

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 30, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

95 CV 1406 (NG)

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL and ANIELLO MADONNA as Trustees and Fiduciaries of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds,

Plaintiffs,

v.

C. VOLANTE CORP.,

Defendant.

OPINION AND ORDER

GERSHON, United States District Judge:

This action is brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), for recovery of delinquent pension fund contributions. The plaintiffs move for summary judgment. The defendant opposes the motion and moves to dismiss the complaint on the ground that the court lacks jurisdiction.

Appendix C

FACTS

The following facts are undisputed. The plaintiffs ("the Trustees") are trustees of the Local 282 Welfare, Pension Annuity and Job Training Trust Funds ("the Funds"), which were established pursuant to collective bargaining agreements between Building Material Local Union 282 of the International Brotherhood of Teamsters ("the Union") and employers who utilize Union labor.

The obligations of the employers with respect to the Funds are set forth in the "Agreements and Declarations of Trust of the Funds" ("the Trust Agreement"). The Trust Agreement specifically defines "employer" in relevant part as "each employer who has duly executed a collective bargaining agreement with the Union." Trust Agreement at 1, Section 1. Pursuant to the Trust Agreement, employers are required to make certain contributions to the Funds based upon the amount of Union labor they use.

The defendant, C. Volante Corp., is a truck rental company located in Lynbrook, New York. Rita Volante was the Chief Operating Officer of the company from 1962 until September 1995, when she suffered an incapacitating stroke. Since Ms. Volante's stroke, her son, Carmine Volante, has, with other relatives, continued the operations of the firm.

Volante Corp. is a signatory to the collective bargaining agreement with the Union that was in effect between July 1, 1987 and June 30, 1990. However, the company is not a signatory to the collective bargaining agreements that were in effect between July 1, 1990 and June 30, 1993 and between July 1, 1993 and June 30, 1996.

Appendix C

On a date not specified in the record, the Trustees made a request to perform an audit of Volante Corp.'s books and records. The company acceded to the request, and the audit was performed on November 5 and December 17, 1993. The audit report, dated October 12, 1994, determined that Volante Corp. was delinquent in contributions to the Funds for the period between May 30, 1990 and September 30, 1993 in the amount of $78,183.87, exclusive of interest.

In a letter to the Trustees, dated January 20, 1995, Rita Volante addressed the issue of the deficiency identified by the audit. Ms. Volante asserted that "the main issue in question" was that Volante Corp. had utilized drivers on a temporary basis who were employees of another trucking firm and was "under the assumption they were paying their own benefits." According to Ms. Volante, after having received a copy of the October 12, 1994 audit, she "further investigated" and found that the drivers "may or may not have paid benefits to the union." Asserting that Volante Corp. was "embarrassed by this occurrence," Ms. Volante declared that the Company realized that it had "a responsibility to the funds." Ms. Volante then offered "the following thoughts":

1. We have not had a signed contract since 1989.

2. We have filed application with a bank to get financing. The maximum we can borrow is $30,000.00.

3. Therefore, would propose a $35,000.00 pay out to cover the total liability to the funds.

4. This proposal is based on the amount C. Volante Corp. could afford without jeopardizing the financial stability of the firm.

Finally, Ms. Volante "enclosed a check for $5,000.00 down as good faith in cementing the relationship of Local 282 and C. Volante Corp." The Trustees rejected Ms. Volante's offer at their February 1, 1995 board meeting and brought this suit on April 7, 1995.

DISCUSSION

A. Volante Corp.'s Motion to Dismiss.

Volante Corp. contends that the court lacks subject matter jurisdiction over this action because the dispute between the parties lies within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). This argument is without merit.

Volante Corp. relies upon *Laborers Health and Welfare Trust Fund for Northern Cal. v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539 (1988). There, the Supreme Court held that the NLRB exercises exclusive jurisdiction over disputes as to whether an employer has a continuing obligation to make contributions to a union pension fund during the period after the expiration of a collective bargaining agreement, but while negotiations toward a new collective bargaining agreement remain ongoing. The Court was explicit that its holding applied only to this particular type of dispute. Quoting the Ninth Circuit opinion that it affirmed, the Court thus limited its holding to "that narrow

category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and [an] impasse" of negotiation. 484 U.S. at 545.

The dispute between the Trustees and Volante Corp. is not one to which *Advanced Lightweight* is applicable. There have been collective bargaining agreements in force throughout the time relevant to this action. As will be seen, the issue in this case is not whether Volante Corp. had any obligation to the Funds after the expiration of a collective bargaining agreement, but whether the company is bound by valid collective bargaining agreements to which it was not a signatory. Thus, *Advanced Lightweight* is simply irrelevant to this action, and Volante Corp.'s motion to dismiss must be denied. *See Scarfi v. Bright Star Indus., Inc.*, 779 F. Supp. 687, 689 (E.D.N.Y. 1992) (*Advanced Lightweight* inapplicable to case involving "a still-valid collective bargaining agreement as well as a still-valid trust agreement").

B. The Trustees' Motion for Summary Judgment.

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there in no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Of course, the inquiry as to whether a genuine issue of material fact exists is governed by the principle that "all justifiable inferences" are to be drawn in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Appendix C

A genuine issue, exists, and summary judgment must be denied, "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* at 248.

The Trustees argue that Volante Corp.'s only defense to liability for delinquent trust contributions is that it did not sign either the 1990-1993 or 1993-1996 collective bargaining agreements and was therefore not an "Employer" during these years within the meaning of the Trust Agreement. This defense fails, the Trustees argue, because, as a matter of law, Volante Corp. adopted and bound itself to both of these collective bargaining agreements through a course of conduct.

An employer who has not formally executed a collective bargaining agreement may still be held to have adopted it through a course of conduct indicative of an intent to be bound by its terms. *See, e.g., Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) (citing cases); *UIU Health & Welfare Fund v. N.Y Flame Proofing Co.*, 828 F.2d 79, 83 (2d Cir. 1987).

Volante Corp. was a signatory to the 1987-1990 collective bargaining agreement, and the company acceded without challenge to the Trustees' request for an audit. The audit was conducted for the period between May 30, 1990 and September 30, 1993, a period which embraces all three collective bargaining agreements, the one to which Volante Corp. was a signatory and the two later ones to which it was not. After receiving the audit report for that period, Ms. Volante acknowledged in writing that Volante Corp. had "a responsibility to the funds." Indeed, Ms. Volante strove to

fulfill that obligation by offering the Trustees a proposal to settle the delinquency set forth in the audit report.

The conclusion that Volante Corp. bound itself to the collective bargaining agreements becomes inescapable in light of its submission to the funds of "remittance reports" for sixty-one consecutive months in the period between June 1990 and June 1995. These reports, which have been placed in the record by the Trustees, are employer statements of contributions due to the Funds.

What is more, when he was deposed as Volante Corp.'s corporate representative, Carmine Volante testified that all of the company's drivers are paid union scale; all are members of the Union, or sought to become so, and that all of the company's jobs are union jobs. Deposition of Carmine Volante at 11-12, 16. Further, the Trustees have submitted an unrefuted affidavit establishing that Volante Corp. maintained a surety bond to guarantee payment of contributions to the Funds, which was required by the collective bargaining agreement.

In response, Volante Corp. argues that Carmine Volante testified that he was uncertain of his competency to testify about company affairs because he had only recently taken the helm at the company because of his mother's stroke. But the company offers nothing to counter Ms. Volante's own acknowledgment that Volante Corp. had "a responsibility to the funds." Rather, Carmine Volante now submits an affidavit in which he contradicts the admissions he made at his deposition. However, "a party may not create an issue of fact by submitting an affidavit in opposition to a summary

judgment motion that, by omission or addition, contradicts the affiant's previous deposition testimony." *Hayes v. New York City Dept. of Corrections*, 84 F.3d 614, 619 (2d Cir. 1996). To hold otherwise " 'would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.' " *Id.* (quoting *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

Moreover, Mr. Volante offers no elaboration or support for ambiguous statements made in his affidavit, such as thatVolante Corp. did not pay wages "in accordance with the specific provisions" of the collective bargaining agreements or that it did not maintain a surety bond "in accordance with the express provisions" of the agreements. Carmine Volante Affidavit at ¶¶ 8, 11. Similarly, the attempt to minimize the record by stating that "from time to time [Volante Corp.] made sporadic contributions" to the Funds, Carmine Volante Affidavit at ¶ 7, is belied by the undisputed documentary evidence of sixty-one consecutive months of remittance reports.

The single document offered by Volante Corp. to refute the Trustees' contentions does not overcome the undisputed evidence. In a letter of September 12, 1995, the Union informed the company that, "(a)lthough we are aware that your dues and benefit contributions are paid timely and to date," the application of one of Volante Corp.'s drivers to join the Union could not be processed until the company signed the 1990-1993 and 1993-1996 collective bargaining agreements. Volante Corp. offers this as evidence that the Union did not consider the company to be bound by these collective bargaining agreements. Although it is clear from

the letter that the Union wanted Volante Corp. to sign the collective bargaining agreements, the letter does not establish that the Union did not consider the company bound by the collective bargaining agreements. Put another way, in the face of the undisputed evidence, this letter alone is too thin a reed to support a reasonable jury's conclusion that the defendant did not, through a course of conduct, agree to be bound by the collective bargaining agreements.

In sum, there is no issue of material fact with regard to Volante Corp.'s adoption through a course of conduct of an obligation to the Funds under the collective bargaining agreements. The company cannot reap the benefits of a contractual relationship with the Union, including the benefits to its employees arising under the Funds, without fulfilling its obligations under the applicable contracts. Its intent to be bound is clear. The Trustees are therefore entitled to summary judgment.

CONCLUSION

Volante Corp.'s motion to dismiss is DENIED. The Trustees' motion for summary judgment is GRANTED. Since Volante Corp. has yet to produce all pertinent documentation regarding its contribution obligations, the company is ordered to produce such documentation within thirty days so that a further audit may be conducted. Upon completion of this audit, the parties are directed to Magistrate Judge Pohorelsky for a determination of all damages, interest and attorneys' fees to which the Trustees are entitled under ERISA.

Appendix C

SO ORDERED.

s/ Nina Gershon
Nina Gershon
United States District Judge

Dated: Brooklyn, New York
July 30, 1997

APPENDIX D — RELEVANT STATUTES

Section 302(c)(5)(B) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 186(c)(5)(B)

§ 186. Restrictions on financial transactions

* * *

(c) Exceptions

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal

office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; . . .

* * *

Section 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1145

§ 1145. Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

* * * *

Supreme Court, U.S.
FILED
FEB 4 2000
CLERK

No. 99-1124

IN THE

Supreme Court of the United States

C. VOLANTE CORP.,

Petitioner,

v.

JOHNNIE BROWN, THEODORE KING, ALDO COLUSSI, GEORGE FINCH, CHESTER BROMAN, JOSEPH FERRARA, FRANK FINKEL, and ANIELLO MADONNA, as Trustees and Fiduciaries of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

Johnnie Brown, Theodore King, Aldo Colussi, George Finch, Chester Broman, Joseph Ferrara, Frank Finkel and Aniello Madonna, as Trustees and Fiduciaries (the "Trustees" or "Respondents") of the Local 282 Welfare, Pension, Annuity and Job Training Trust Funds (the "Funds"), submit this brief in opposition to the Petition for a Writ of Certiorari, docketed on January 5, 2000 (the "Petition"), by C. Volante Corp. ("Petitioner").

On October 8, 1999, the United States Court of Appeals for the Second Circuit decided the case at issue — *Brown v. C. Volante Corp.*, No. 99-7109, 194 F.3d 351 (2d Cir. 1999) (hereinafter the "Volante Decision"). (Annexed to the Petition as Appendix A is the Volante Decision.) In the Volante Decision, the Second Circuit affirmed the decision of the United States District Court for the Eastern District of New York. The District Court held, *inter alia*, that it had jurisdiction to decide this matter, that Petitioner adopted by its conduct two collective bargaining agreements with Local 282, I.B.T. ("Local 282"), and that Petitioner therefore owes the Trustees benefit fund contributions, interest, additional interest and attorneys' fees pursuant to Section 502(g)(2) of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. § 1132(g)(2). (Annexed as Appendix B to the Petition is the Amended Final Judgment of the District Court; annexed as Appendix C to the Petition is the Opinion and Order of the District Court.)

The United States Supreme Court should deny the Petition because there is no conflict between the Second Circuit and any other circuit over the issues raised in the Volante Decision. Specifically, the Volante Decision does

not create a division between the Second Circuit and the Fifth Circuit as to whether a District Court can exercise jurisdiction, pursuant to Section 301 of the Labor-Management Relations Act (the "LMRA"), 29 U.S.C. § 185, and Sections 502 and 515 of ERISA, 29 U.S.C. §§ 1132, 1145, over an action to collect benefit fund contributions and other damages premised upon an adopted contract. In addition, the Volante Decision does not create a split between the Second Circuit and the Fifth Circuit as to whether a signed, written agreement is required under Section 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B).

Further, the Volante Decision does not create a conflict between the Second Circuit and the Third, Fifth, Sixth, Seventh and Ninth Circuits as to whether a federal cause of action can be premised upon an adopted contract. Finally, assuming the viability of the theory of adoption of contract, the Second Circuit did not act in conflict with the Third and Fifth Circuits in finding that Petitioner adopted the subject collective bargaining agreements based upon the instant record.

As discussed below, adoption of contract is a well-established doctrine, and one that the federal courts apply routinely within the labor relations setting. Strikingly, Petitioner cites *no* cases in its Petition that reject adoption *per se*. Rather, it invokes two sets of circumstances in which courts have found that trustees of benefit funds cannot prevail in federal court with respect to the collection of contributions. First, Petitioner cites *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), and its progeny. Yet, *Advanced Lightweight* is irrelevant to the case at bar, as it stands only for the narrow rule that federal courts do not have jurisdiction over claims

for contributions based on adherence by an employer to an expired contract pursuant to the employer's obligation under Section 8(a)(5) of the LMRA, 29 U.S.C. § 158(a)(5). In the instant case, the Second Circuit found that Petitioner adopted *current* contracts and not expired contracts. Thus, Section 8(a)(5) was not at issue.

Second, Petitioner cites cases in which courts have denied claims for contributions based on the failure by parties to satisfy the requirement under LMRA Section 302(c)(5)(B) ("Section 302") that contributions be paid pursuant to a "written agreement with the employer." However, such cases do not run counter to the Volante Decision, in which the Second Circuit correctly held that the adopted contracts at issue were detailed written agreements that satisfied the Section 302 requirement.

In short, the Volante Decision did not create any conflict between the Second Circuit and any other circuit court (or within the Second Circuit) with respect to the jurisdiction of federal courts to hear claims stemming from an adopted contract, given that *Advanced Lightweight* is irrelevant in these circumstances and that Section 302 was fully satisfied.

As a fallback position, Petitioner contends in the Petition that even if adoption of contract is an established doctrine, the Second Circuit examined improper indicia in finding adoption. Petitioner is mistaken. The Second Circuit employed precisely the criteria that courts always use. Therefore, no conflict between circuits (or within the Second Circuit)[1] exists with respect to this issue either.

1. To the extent Petitioner contends that a split *within* the Second Circuit is cause for the Supreme Court to grant certiorari, (Cont'd)

I. THERE IS NO CONFLICT AMONG THE CIRCUITS WITH RESPECT TO THE JURISDICTION OF FEDERAL COURTS TO ADDRESS CLAIMS FOR DELINQUENT CONTRIBUTIONS PURSUANT TO AN ADOPTED CONTRACT

A. The District Courts Have Jurisdiction To Decide Claims Pursuant To An Adopted Contract

Pursuant to its grants of jurisdiction under ERISA and the LMRA, and as held by the Second Circuit, the District Court properly asserted jurisdiction over the instant claim for benefit fund contributions pursuant to an adopted contract. (Appendix A at 6a.) In opposition, Petitioners claim that once a contract expires, the District Court does not have jurisdiction to decide a claim stemming from a subsequent contract unless it has been executed. (Petition at 6-7.) In making this claim, Petitioners ignore the well-established body of law recognizing adoption of contract under federal common law (discussed *infra* in Section I(B)), and engage in a protracted and misdirected discussion of *Advanced Lightweight*, *supra*, and its progeny.

(Cont'd)

Petitioner is incorrect, and the Petition should be denied. *See* U.S. Sup. Ct. R. 10 (indicating that conflict between courts of appeals is specific consideration in deciding whether to grant petition for writ of certiorari; conflict within a court of appeals is not named as a consideration); *Textile Mills Securities Corp. v. Commission of Internal Revenue*, 314 U.S. 326, 335 (1941) (commenting that conflicts within a circuit are properly addressed by a court of appeals sitting *en banc*); *see also Braxton v. United States*, 500 U.S. 344, 347 (1991) ("[a] principal purpose for which . . . [the U.S. Supreme Court] use[s] . . . [its] certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals").

Contrary to Petitioner's contention, the decision in *Advanced Lightweight* is simply not germane to the case at bar. The instant case has nothing to do with the general rule of NLRB jurisdiction over unfair labor practice claims, or with "that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse." *Advanced Lightweight*, 484 U.S. at 545. The issue in these proceedings was never whether Petitioner had adopted by its conduct the *expired* 1987-1990 contract; rather, the Trustees established that Petitioner adopted by its conduct the 1990-1993 and 1993-1996 contracts, which corresponded to the period for which the Trustees sought to recover delinquent contributions. (Appendix C at 24a; Appendix A at 7a-11a.)

In the Volante Decision, the Second Circuit described the irrelevance of *Advanced Lightweight* to the instant case:

> The Trustees brought the instant claims pursuant to Sections 502(g)(2) and 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1132(g)(2), 1145, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. In *Advanced Lightweight*, the Supreme Court held that ERISA Sections 502(g)(2) and 515 do not confer subject matter jurisdiction over claims "to determine whether an employer's unilateral decision to refuse to make post-contract contributions constitutes a violation of the [National Labor Relations Act]." 484 U.S. at 549. According to the Court, Sections 502(g)(2) and 515 confer jurisdiction only over claims for "promised contributions," not over unfair labor practice

claims that an employer has refused to bargain in good faith by failing to make post-contract benefit plan contributions before negotiations for a new contract reached an impasse. See *Advanced Lightweight*, 484 U.S. at 548-49. The decision, therefore, stands only for the unremarkable proposition that the National Labor Relations Board generally has exclusive jurisdiction over unfair labor practice claims. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that employer's failure to honor terms of expired CBA during negotiations on new CBA constitutes unfair labor practice); *Advanced Lightweight*, 484 U.S. at 543 n.4 ("As a general rule, federal courts do not have jurisdiction over" unfair labor practice claims.) (internal quotation marks omitted); *but see id.* (noting that federal courts have jurisdiction over unfair labor practice claims that are "collateral" to claims over which there is an independent basis for jurisdiction).

Although it is true that the Trustees' claims arise from appellant's alleged failure to contribute to the Fund after the signed CBA expired, this does not render them *per se* unfair labor practice claims over which the district court lacks jurisdiction under *Advanced Lightweight*. The Trustees are not arguing that appellant has unlawfully refused to bargain by making unilateral changes in working conditions before reaching an impasse over a new CBA. Rather, the Trustees claim that appellant promised to contribute to the Fund by adopting the two CBAs that it never signed. Appellees' claims are thus clearly for "contributions [owing]

> in accordance with the terms and conditions of . . . [a collective bargaining] agreement," 29 U.S.C. §1145, and "violation[s] of contracts between an employer and a labor organization," 29 U.S.C. § 185(a), over which the district court has jurisdiction. See *Advanced Lightweight*, 484 U.S. at 547 ("The liability created by §515 may be enforced by the trustees of a plan by bringing an action in federal district court . . ."); 29 U.S.C. § 185(a).

(Appendix A at 5a-6a.) In short, the holding in *Advanced Lightweight* is inapposite to this case. Here, the Petitioner did not act under the compulsion of LMRA Section 8(a)(5) in abiding by the terms of the expired 1987-1990 agreement. Rather, Petitioner affirmatively complied with the terms of the 1990-1993 and 1993-1996 contracts and, therefore, demonstrated its intent to be bound by these collective bargaining agreements. (Appendix A at 7a.)

Petitioner's misunderstanding of the holding of *Advanced Lightweight* accounts for much of its error in claiming that there is a split between Courts of Appeals (or within the Second Circuit). For example, in Section I of Petitioner's Petition, it points to the Second Circuit's decisions in *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 29 (2d Cir. 1988), *UAW, Local 33 v. R.E. Dietz Co.*, 996 F.2d 592, 597 (2d Cir. 1993), and *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310, 312-313 (2d Cir. 1990), *cert. denied*, 498 U.S. 982 (1990), as support for its claim that the Second Circuit in the Volante Decision decided the jurisdiction issue incorrectly.[2] (Petition

2. Petitioner also invokes *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *cert. denied*, 394 U.S. 919 (1969), as support for its (Cont'd)

at 6-10.) Yet, the Second Circuit did not reject the doctrine that a District Court holds jurisdiction over a claim for benefit fund contributions pursuant to an adopted contract in these cases. Rather, in both *Derrico* and *Dietz*,[3] the Second Circuit applied the narrow rule set forth in *Advanced Lightweight* to circumstances in which adoption of a current contract was not alleged, and in which the obligation to abide by the expired contract stemmed only from a duty to maintain the status quo pursuant to LMRA Section 8(a)(5).[4] *Dietz*, 996 F.2d at 597; *Derrico*, 844 F.2d at 26.

(Cont'd)
contention in Section I of the Petition that the District Court lacked jurisdiction to decide the instant case. However, the holding in *Moglia* did not implicate the issue of whether a District Court has jurisdiction to resolve a claim after expiration of a collective bargaining agreement. *Id.* at 114-115. The holding in *Moglia* is applicable primarily to the question of whether an unsigned written agreement can be in compliance with LMRA Section 302(c)(5). The Trustees discuss this issue, *infra*, in Section I(C) of this brief.

3. In *Brower's*, the court did not address adoption, and referred to *Advanced Lightweight* merely for the general proposition that an employer's liability under ERISA is limited to those periods in which collective bargaining agreements are "effective." *Brower's*, 907 F.2d at 316.

4. Petitioner also cites *Brown v. Dominic Prisco Transport, Inc.*, No. 95 Civ. 1121 (ADS) (E.D.N.Y. Aug. 16, 1997), and *Hanley v. Herrill Bowling Corp.*, No. 94 Civ. 4611, 1995 U.S. Dist. LEXIS 10109 (S.D.N.Y. July 20, 1995), in Section I of the Petition. Of course, the Volante Decision would prevail over such cases to the extent that they were in conflict. However, no such conflict exists. Both cases acknowledge the narrow rule of *Advanced Lightweight*, but neither can be read as denying the jurisdiction of federal courts to decide a cause of action based upon an adopted contract. *Dominic Prisco Transport*, No. 95 Civ. 1121, at 24; *Hanley v. Herrill*, 1995 U.S. Dist. LEXIS 10109, at *6-*7.

Moreover, there is no division between the Second Circuit's finding of jurisdiction in the Volante Decision and the Fifth Circuit's decision in *Firesheets v. A.G. Building Specialists, Inc.*, 134 F.3d 729 (5th Cir. 1998). In short, the *Firesheets* court did not discuss the issue of the jurisdiction of the district court to resolve the claims of the trust fund for contributions. *Id.* The Fifth Circuit discussed the factual determination of the district court that the original agreement had terminated, and that the parties had not intended to keep it in place. *Id.* at 731. Such determination is of no relevance to the jurisdiction issue here.

Further, the *Firesheets* court found that the employer had not evidenced intent to adopt the contracts at issue. *Id.* at 731-32. Although the Fifth Circuit did not discuss jurisdiction in its analysis of the adoption argument, its reference to *NLRB v. Haberman*, 641 F.2d 351, 355-56 (5th Cir. 1981), is an implicit endorsement of the Second Circuit's finding of jurisdiction to adjudicate a claim pursuant to an adopted contract. As to the Fifth Circuit's discussion of the requirements of LMRA 302(c)(5), this discussion does not bear upon the jurisdiction issue, and Respondents address this issue, below, in Section I(C).

B. The Doctrine of Adoption Of Contract Is Well-Established In The Federal Courts

Contrary to Volante's contention, there is no conflict among the Courts of Appeals with respect to the existence of a federal common law cause of action for breach of an adopted contract. None of the decisions cited by Petitioner in the Petition rejects the doctrine of adoption of contract. In fact, federal courts routinely hold that employers can adopt collective bargaining agreements by their conduct.

See, e.g., Gariup v. Birchler Ceiling & Interior Co., 777 F.2d 370, 376 (7th Cir. 1985) (finding that employer became "a party to these agreements through its course of conduct," including payment of wages and contributions at contract rates).[5]

In the face of the overwhelming body of case law endorsing the doctrine of adoption of contract, Petitioner attempts to cast doubt upon the doctrine by citing several cases in which courts declined to hold that employers adopted contracts. Petitioner cites two categories of cases to support its Petition: (1) cases where the plaintiff attempted to rely upon an expired contract as a basis for its claim under

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5. *See also Moriarty v. Larry G. Lewis Funeral Dirs. Ltd.*, 150 F.3d 773, 777 (7th Cir. 1998) ("general principles of contract law permit an employer to adopt a collective bargaining agreement by a course of conduct plus a writing such as the certification line on the contribution report"); *U.S. Can Co. v. NLRB*, 984 F.2d 864, 868-870 (7th Cir. 1993) (finding adoption of contract based not on fact that employer is successor, but rather on conduct in conformity with contract); *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988) ("[e]mployer may adopt a collective bargaining agreement by a course of conduct"); *Baskin v. Hawley*, 807 F.2d 1120, 1129 (2d Cir. 1986) (confirming jury's finding of adoption, based on employer's submission of benefit fund contributions and use of union employees); *Atlanta Iron Workers v. Southern Stress Wire Corp.*, 724 F.2d 1458, 1459-1460 (11th Cir. 1983) (finding that employer adopted pre-hire agreement, with court holding that such a "contract is not dependent on its reduction to writing . . . [i]nstead, conduct manifesting an intention to abide by the terms of an agreement is required"); *Audit Servs., Inc. v. Rolfson*, 641 F.2d 757, 763-764 (9th Cir. 1981) (finding adoption of contract based not on fact that employer is successor, but rather on conduct reflecting adherence to contract); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 355-356 (5th Cir. 1981) (finding adoption of prehire agreement based on conformity to agreement).

circumstances governed by the holding in *Advanced Lightweight*, *supra*; and (2) cases where courts recognized the theory of adoption, but found that the plaintiff had failed to establish sufficient adoption indicia. Yet, such cases do not conflict with the Volante Decision.

In fact, none of the cases cited by Petitioner in Section II of the Petition supports its contention that there is a conflict with respect to the doctrine of adoption of contract either within the Second Circuit[6] or between the Second Circuit

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6. *See Dietz*, 996 F.2d at 597 (following *Advanced Lightweight* where adoption of current contract not alleged); *Derrico*, 844 F.2d at 26 (same); *Moglia*, 403 F.2d 118 ("on the record as made, we hold that there was no ratification of, or any adoption of, the collective bargaining agreement by [the employer]"); *Hanley v. Orient Beach Club, Inc.*, No. 96 Civ. 4478, 1998 U.S. Dist. LEXIS 1700, at *20-*21 (S.D.N.Y. Feb. 18, 1998) (following *Advanced Lightweight* where employer had claim for offset as to benefit fund contributions paid after contract expired and before parties bargained to impasse); *Brown v. Dominic Prisco Transport., Inc.*, No. 95 Civ. 1121, at 24 ("under the facts of the present case, the Court concludes that the conduct alleged by the Trustees is insufficient to demonstrate that HLC adopted the previous collective bargaining agreement"); *Smith v. Candler Coffee Corp.*, No. 95 Civ. 10956, 1996 U.S. Dist. LEXIS 10935, at *4-*11 (S.D.N.Y. Aug. 2, 1996) (after reviewing whether an "implied-in-fact-contract" existed, court followed *Advanced Lightweight* where plaintiff invoked Section 8(a)(5) with respect to payment of benefit fund contributions); *Hanley v. Herrill*, 1995 U.S. Dist. LEXIS 10109, at *6-*7 (following *Advanced Lightweight* where employer "may have felt obligated to continue its contributions to the Funds in order to maintain the 'status quo' after the expiration of the 1990 CBA under NLRA § 8(a)(5)"); *Wenzel v. Jeff Parking Corp.*, No. 93 Civ. 5071, 1995 U.S. Dist. LEXIS 5815, at *5, *14-*15 (S.D.N.Y. May 3, 1995) (finding submission of eight benefit fund contribution payments and one

(Cont'd)

and the Third, Fifth, Sixth, Seventh or Ninth Circuit Courts of Appeals. To begin with, in *Empire Excavating Co. v. American Arbitration Ass'n*, 693 F. Supp. 1557 (M.D. Pa. 1988), *aff'd without opinion*, 866 F.2d 1409 (3d Cir. 1988), the Third Circuit endorsed adoption, finding that in order "for a collective bargaining agreement to be found, all that is required is conduct manifesting an intention to be bound by the terms of an agreement." *Empire Excavating*, 693 F. Supp. at 1562. However, the court found that the employer had refused to comply with the terms of the current contract and had, therefore, not adopted the contract by its conduct. *Id.* at 1563. Instead, the employer had adhered only to the terms of the expired contract, thus bringing the case within the purview of the *Advanced Lightweight* rule. *Id.* at 1561.

Further, in *Firesheets*, *supra*, the Fifth Circuit cited approvingly to its own recognition of the adoption doctrine in *Haberman*, 641 F.2d at 355-56, but then found that the employer's "actions, by and large, are inconsistent with the creation of a new agreement." *Firesheets*, 134 F.3d at 731-732.

(Cont'd)

remittance report to be insufficient to evidence adoption); *Wenzel v. Edison Parking Corp.*, No. 94 Civ. 1971, 1995 U.S. Dist. LEXIS 3857, at *5-*6, *9-*10 (S.D.N.Y. March 29, 1995) (following *Advanced Lightweight* where employer stated that it paid benefit fund contributions in accord with expired agreement in order to comply with Section 8(a)(5)); *Associated Wrecking, Inc. v. Local 95 Pension Fund*, No. 92 Civ. 1841, 1994 U.S. Dist. LEXIS 3952, at *4-*5 (S.D.N.Y. March 31, 1994) (following *Advanced Lightweight* where plaintiff claimed employer had duty to pay contributions in accord with expired contract). *See also Johnnie Brown v. J.F.H. Mak Trucking*, No. 95 Civ. 2118, 1999 U.S. Dist. LEXIS 17831 (E.D.N.Y. October 6, 1999) (court not faced with adoption issue or *Advanced Lightweight* rule, but rather simply found that contractual obligation to maintain surety bond expired with expiration of contract).

In *Lattin v. Kurdziel Iron of Rothbury, Inc.*, No. 96-2558, 1998 U.S. App. LEXIS 10205 (6th Cir. May 15, 1998), the Sixth Circuit followed the *Advanced Lightweight* rule where the issue was enforcement of an expired contract, and the question of adoption of a current contract never arose. *Lattin*, 1998 U.S. App. LEXIS 10205, at *2-*4. Likewise, in *International Association of Bridge, Structural and Ornamental Iron Workers v. SR Industries Corporation*, No. 90 Civ. 1071, 1991 U.S. App. LEXIS 18819 (7th Cir. August 9, 1991), the Seventh Circuit found that, pursuant to *Advanced Lightweight*, the district court lacked jurisdiction over a claim for benefit fund contributions allegedly owed after the expiration of a contract, where adoption was never raised. *SR Industries*, 1991 U.S. App. LEXIS 18819, at *11-*12.

Finally, in *Collins v. Pension and Ins. Comm.*, 144 F.3d 1279 (9th Cir. 1998), and *UA Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465 (9th Cir. 1994), the Ninth Circuit also acknowledged the rule of *Advanced Lightweight*, but did not reject the doctrine of adoption of contract. In *Collins*, the issue of adoption of contract did not even arise. *Collins*, 144 F.3d at 1283-1284. In *Nor-Cal*, the court rejected the application of *Advanced Lightweight* to circumstances in which the employer was not a contract signatory, but formed a single employer with a company that had signed a contract.[7] *Nor-Cal*, 48 F.3d at 1470-1471.

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7. It is odd that Petitioner cites *Nor-Cal*, given the court's holding in that case that federal courts have jurisdiction over claims for delinquent contributions where an employer has *not* signed a contract (but is a single employer with an employer that has). *Nor-Cal*, 48 F.3d at 1470-1471.

Accordingly, because there is no conflict among the Courts of Appeals, the Court should deny the Petition.

C. There Is No Conflict Among Courts Of Appeals With Respect To The Section 302 Requirement

Petitioner argues in Section I of the Petition that Section 302 precludes adoption of contract in the ERISA setting. (Petition at 9a-11a.) This is false. No circuit court — including the Second, Fifth and Seventh Circuits — has ever found that Section 302 is not satisfied by an adopted contract.

According to Petitioner, the Section 302 requirement that payments to a trust fund be made pursuant to a "written agreement" would be violated if Petitioner were ordered to pay benefit fund contributions to the Trustees in this case.[8]

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8. Petitioner seems to argue in the Petition that Section 302 must be satisfied in order to give federal courts jurisdiction over claims based on adopted contracts. However, Section 302 is not a jurisdictional provision. *See* LMRA Section 301(c), 29 U.S.C. § 185(c) (the provision of the LMRA that provides jurisdiction to the federal courts over the instant claim). Rather, Section 302 provides certain conditions that must be satisfied for the payment of benefit fund contributions by an employer to a trust fund to be legal. *See* Appendix A at 8a (Section 302(c)(5)(B) requires that an agreement be " 'written' and [that it] set forth 'a detailed basis on which . . . payments are to be made' to a trust fund"); *Denver Metro. Ass'n v. Journeymen Plumbers & Gas Fitters Local No. 3*, 586 F.2d 1367, 1372 (10th Cir. 1978) (as evidenced by the pertinent legislative history, "the purpose of the provision is that the welfare fund shall be a perfectly definite fund, that its purposes shall be stated so that each employee can know what he is entitled to, can go to court and enforce his rights in the fund, and that it shall not be, therefore, in the sole discretion of the union or the union leaders and usable for any purpose which they may think is to the advantage of the union or the employee").

In short, Petitioner contends that adopted contracts — because they are unsigned — do not satisfy the "written agreement" requirement.[9] (Petition at 9-11.)

In the Volante Decision, the Second Circuit expressly disposed of Petitioner's contention, as follows:

> Appellant's argument, however, overlooks the statutory language. Section 302(c)(5)(B) does not require that an agreement be signed, only that it be "written" and set forth "a detailed basis on which . . . payments are to be made" to a trust fund. Id. Accordingly, an unsigned, written agreement satisfies Section 302(c)(5)(B)'s "written agreement" requirement. *See Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir. 1985) (concluding that a "signed, unexpired collective bargaining agreement between the parties is not required to satisfy section 302(c)(5)(B); rather section 302(c)(5)(B) requires only a 'written agreement'").

(Appendix A at 8a.)[10]

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9. Contrary to Volante's assertions of a signature requirement under Section 302, in every decision where a court has endorsed the doctrine of adoption of contract in the ERISA setting, it has found either explicitly or implicitly that the Section 302 requirement does not require a *signed* contract, but rather requires only a *written* contract. *See, e.g., Gariup*, 777 F.2d at 376; *Moriarty*, 150 F.3d at 777; *Lynch*, 836 F.2d at 332; *Southern Stress*, 724 F.2d at 1459-1460; *Audit Servs.*, 641 F.2d at 763-764.

10. As a matter of well-settled statutory construction, where language is clear and unambiguous, courts reject attempts to engraft

(Cont'd)

In opposing the Second Circuit's holding, Petitioner argues that the Volante Decision, as well as Seventh Circuit holdings in accord, conflict with other cases in the Second Circuit, as well as with the Fifth Circuit's decision in *Firesheets*. (Petition at 14-15.) Petitioner's argument is without merit.

To begin with, Petitioner misconstrues the Second Circuit's decision in *Moglia*. In *Moglia*, the issue revolved around the denial of benefits to a plaintiff by a pension fund, such denial being based on "the fact that there never ha[d] been a written collective bargaining agreement or any other written agreement between [the employer] and [the union] detailing the basis upon which payments were to be made by [the employer], on behalf of its employees, into the Trust Fund." *Moglia*, 403 F.2d at 115. In the instant case, it is undisputed that Petitioner was a party to at least one signed, written contract prior to the period at issue.

Petitioner claims, nonetheless, that the court in *Moglia* found that no written agreement under Section 302 can exist without a signature. (Petition at 9-11.) In the Volante Decision, the Second Circuit squarely rejected this misinterpretation of its decision in *Moglia*:

(Cont'd)
additional requirements or limitations upon the statute. *See United States v. Turkette*, 452 U.S. 576, 580-81 (1981) ("[i]f the statutory language is unambiguous, in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'"); *United States v. Stephenson*, 895 F.2d 867, 871 (2d Cir. 1990) ("we decline to fashion a restrictive view of a statute that is plain on its face"). Thus, if Congress had intended that Section 302(c)(5) only apply to *signed* written agreements, it could have quite easily inserted the word "signed" into the statute.

> Our decision in *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), is not to the contrary. There, we held that an unsigned, written agreement between a union and a trust fund did not comply with Section 302(c)(5)(B) when the union and the trust fund "never" had a signed CBA detailing the basis upon which payments were to be made. 403 F.2d at 114, 115. We rejected a putative beneficiary's argument that its employer adopted the unsigned agreement because, on the facts of that case, the employer "did not appear to be willing to accept [the] terms [of the unsigned CBA] at any time." *Id.* at 118.

(Appendix A at 8a, n.1.) As further held in the Volante Decision, the Second Circuit in *Moglia* did not

> graft a signature requirement onto Section 302(c)(5)(B). Unlike the employer in *Moglia*, appellant's conduct manifested an intent to adopt the terms of the unsigned CBAs.

(Appendix A at 8a, n.1.)

An examination of *Moglia* supports the Second Circuit's holding in the Volante Decision. To begin with, the *Moglia* court — in invoking the "specific dictates" of Section 302 — focused on the requirement of "a written agreement," and not a *signed* written agreement. *Moglia*, 403 F.2d at 115-116. The court then highlighted the plaintiff's admission that "at no time relevant to the cause of action asserted in her complaint [was there] a collective bargaining agreement or any other written agreement, as such" between the employer and the union. *Id.* at 117.

Further, in concluding that there had never been a "written agreement," the court in *Moglia* pointed out not only that the employer had made pension contributions pursuant to an unsigned contract, but also that the unsigned contract *had never been adopted*. In fact, the Second Circuit in *Moglia* unequivocally endorsed the doctrine of adoption of contract, but concluded that "*on the record as made*, we hold that there was no ratification of, or any adoption of, the collective bargaining agreement by [the employer]" (emphasis added). *Id.* at 118.

Hence, the decision in *Moglia* stands for a straightforward proposition, namely, that in the absence of adoption, an unsigned contract does not fulfill the Section 302 requirement.[11] Of course, in contrast to the circumstances in *Moglia*, Petitioner *did* adopt contracts with the Union during the relevant period. Accordingly, the Second Circuit correctly rejected Petitioner's assertion of Section 302 as a defense.

In any event, regardless of Petitioner's view of *Moglia*,[12]

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11. *See Gariup*, 777 F.2d at 376 (holding that *Moglia* does not hold that a signed, unexpired collective bargaining agreement must exist to satisfy section 302; rather it was the absence of any 'written agreement' that led the court in *Moglia* to determine that section 302(c)(5)(B) had not been satisfied").

12. It should be noted that the Second Circuit has previously interpreted *Moglia* in the same fashion. In *Baskin*, the Second Circuit stated that *Moglia*

> suggests that an employer may be bound to [a collective bargaining] agreement either by signing it or by adopting and ratifying it.

(Cont'd)

the Second Circuit's interpretation of that case in the Volante Decision is binding.[13]

Similarly, there is no conflict between the Volante Decision and the Fifth Circuit's holding in *Firesheets*, *supra*. In *Firesheets*, benefit fund trustees argued that an employer underpaid contributions for a period subsequent to the expiration of a collective bargaining agreement. In ruling against the plaintiffs, the court found first that the original contract had expired and that the parties had not intended it to continue. *Firesheets*, 134 F.3d at 731. The court then held that the employer had not adopted a contract subsequent to the expired one. Finally, having found that the original

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(Cont'd)
Baskin, 807 F.2d at 1128-1129. Petitioner also contends that another Second Circuit decision, *Brower's*, *supra*, requires the existence of a signed contract in order for a federal court to exercise jurisdiction over a claim for contributions. (Petition at 7.) In fact, the court in *Brower's* held that the employer "must contribute to the Funds without a preliminary determination that there exists a collective bargaining agreement that would be recognized as valid under labor-management relations law." *Brower's*, 907 F.2d at 316. Further, the Second Circuit in that case did not address Section 302 or adoption, but merely referred to the employer as a contract signatory. *Id.* at 314.

13. As noted above, a court of appeals sitting *en banc* is the only entity with the authority to resolve an intra-circuit conflict. *See, e.g.*, *Textile Mills*, 62 S. Ct. at 277-278. This is the case even where contemporaneous panels conflict. *See, e.g.*, *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (holding that it is "primarily the task of a Court of Appeals to reconcile its internal difficulties"). Of course, in the case at bar — with respect to the *Moglia* decision — there are no conflicting decisions between panels; rather the Second Circuit panel that rendered the Volante Decision has simply elaborated upon the holding issued by a sister panel three decades ago.

agreement had expired and that no subsequent contract had taken its place, the court concluded that no agreement existed during the relevant period to satisfy the Section 302 requirement. *Id.* at 731-32. The *Firesheets* court, like the *Moglia* court, premised its finding that Section 302 was not satisfied on the absence of a signed contract *or* an adopted contract. *Id.*

Without explanation, Petitioner attempts to use *dicta* from *Firesheets* out of context as a holding to the effect "that without signatures on the collective bargaining agreement and the trust agreement attached to it, a written agreement under § 302(c) did not exist." *Firesheets*, 134 F.3d at 732. However, in its discussion of *Firesheets*, Petitioner ignores the court's holding that, as in *Moglia*, a signed contract or an adopted contract satisfies the Section 302 requirement.[14]

A review of the decision in *Firesheets* as a whole demonstrates that the case is fully in accord with the analysis of *Moglia* set forth in the Volante Decision. As in *Moglia*, the court in *Firesheets* endorsed the principle of adoption of contract:

> [T]his circuit has held that "adoption of a labor contract is not dependent on the reduction to writing of [the parties'] intention to be bound. Instead what is required is conduct manifesting an intention to abide by the terms of the agreement" (citation omitted).

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14. The Fifth Circuit's citation to *Bricklayers Local 15 v. Stuart Plastering Co.*, 512 F.2d 1017 (5th Cir. 1975), further supports the *Firesheets* holding that an adopted contract complies with Section 302. In *Bricklayers*, the Fifth Circuit expressly contemplated adoption as an alternative to execution of the written agreement at issue. *Bricklayers*, 512 F.2d at 1029.

Firesheets, 134 F.3d at 731. The Fifth Circuit then reviewed the standard adoption criteria, noting the employer's arguments that its "conduct is not consistent with the formation of an agreement." *Id.* For example, the employer failed to adjust its wage rates and to pay holiday pay according to the contract at issue. *Id.* Finally, the Fifth Circuit concluded that the employer's "actions, by and large, are inconsistent with the creation of a new agreement." *Id.*

It was only after rejecting the plaintiffs' adoption of contract argument that the court in *Firesheets* invoked *Moglia*, pointing to the lack of an executed agreement to satisfy Section 302. Thus, *Firesheets* must be read, like *Moglia* and the Volante Decision, as standing for the principle that *in the absence of adoption*, an unsigned contract does not fulfill the Section 302 requirement.

As discussed next, Petitioner errs in arguing that the indicia of adoption examined by the Second Circuit were improper.

II. THERE IS NO SPLIT AMONG CIRCUIT COURTS WITH RESPECT TO THE INDICIA OF ADOPTION

As a fallback position, Petitioner contends in the Petition that "even if conduct was a basis for finding an adoption of contract, Petitioner's conduct did not indicate an intent to be bound by the unsigned agreements." (Petition at 23.) In short, Petitioner argues that the criteria examined by the Second Circuit in determining that Petitioner adopted contracts with Local 282 were not appropriate. Petitioner is incorrect.

It is simply beyond dispute that the adoption criteria employed by the Second Circuit are the standard indicia courts review in considering adoption. The Second Circuit based its decision that Petitioner adopted the 1990-1993 and 1993-1996 contracts on these findings of fact: Petitioner submitted remittance reports to the Funds for sixty-one consecutive months; Petitioner paid its drivers union-scale wages; Petitioner's drivers all were members, or sought to be members, of the Union; all of the company's work was union work; Petitioner maintained a surety bond as required by the contract in order to guarantee payments of contributions to the Trustees; Petitioner submitted without challenge to an audit by the Trustees for the period covered by the adopted contracts; and, Petitioner acknowledged in writing, after receiving the audit report, that the company had "a responsibility to the funds," and offered to pay part of the liability stemming from the audit. (Appendix A at 7a-10a; Appendix C at 18a-19a, 21a-24a.)

In determining the intent of Petitioner, the Second Circuit (and the lower court) examined precisely the indicia of adoption that courts typically employ. First, a number of courts have considered the payment of contributions at contract rates to be evidence of adoption. *See, e.g., Lynch*, 836 F.2d at 332; *Baskin*, 807 F.2d at 1129; *Gariup*, 777 F.2d at 374; *Southern Stress Wire*, 724 F.2d at 1460; *Haberman*, 641 F.2d at 355; *Audit Services*, 641 F.2d at 763; *LoPresti v. HLH SEPS, Inc.*, No. 96 Civ. 1834, 1996 U.S. Dist. LEXIS 14184, at *6-*7 (S.D.N.Y. Sept. 27, 1996); *Sullivan v. Brinsky*, No. 93 C 5940, 1995 U.S. Dist. LEXIS 2163, at *16-*17 (N.D. Ill. Feb. 23, 1995), *aff'd*, No. 95-2164, 1996 U.S. App. LEXIS 9719 (7th Cir. April 12, 1996); *Chicago District Council of Carpenters v. Ward*, No. 93 C 980, 1993 U.S. Dist. LEXIS 17897, at *11-*12 (N.D. Ill. Dec. 15,

1993); *Painters Trust v. Sandvig-Ostergard*, 737 F. Supp. 1131, 1136 (W.D. Wash. 1990); *Salisbury v. Kroyer Heating and Air Conditioning*, 683 F. Supp. 177, 181 (N.D. Ohio 1986).

Second, courts have often found that the payment of wages at union contract rates is evidence that the corresponding contracts have been adopted. *See, e.g., San Francisco Culinary v. Lucin*, No. 92-15086, No. 92-15099, 1993 U.S. App. LEXIS 33554, at *5 (9th Cir. Dec. 7, 1993); *Lynch*, 836 F.2d at 332; *Gariup*, 777 F.2d at 374; *Southern Stress Wire*, 724 F.2d at 1460; *Haberman*, 641 F.2d at 355; *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952); *Ward*, 1993 U.S. Dist. LEXIS 17897, at *11-*12.

Third, courts have found that if a company employs only union members, this evidences adoption. *See, e.g., Baskin*, 807 F.2d at 1129; *Southern Stress Wire*, 724 F.2d at 1460; *Salisbury*, 683 F. Supp. at 181.

Fourth, courts have considered an employer's maintenance of a surety bond in order to guarantee the payment of benefit fund contributions as a sign of adoption. *See, e.g., Ward*, 1993 U.S. Dist. LEXIS 17897, at *12.

Fifth, courts have found that if a company submits to an audit by union benefit funds, this is evidence that the company has adopted a union contract. *See, e.g., Southern Stress Wire*, 724 F.2d at 1460; *Ward*, 1993 U.S. Dist. LEXIS 17897, at *12.

Petitioner's claim that there is a conflict among the Courts of Appeals over this issue is groundless. (Petition at 26.) To begin with, Petitioner cites cases like *Derrico*, in

which the court found that the payment of contributions did not evidence adoption only because the circumstances lent themselves to the narrow rule of *Advanced Lightweight. Derrico*, 844 F.2d at 26. *See also Dietz*, 996 F.2d at 597; *Dominic Prisco Transport*, No. 95 Civ. 1121, at 21, 24. That is, regardless of whether criteria that ordinarily reflect adoption are present, the obligation of a party to abide by an *expired* contract, by operation of Section 8(a)(5), is enforceable only before the National Labor Relations Board.

To support its proposition, Petitioner cites several courts that did not reject the criteria employed by the Second Circuit in the Volante Decision, but rather found that the plaintiffs in those cases had not proven all of the indicia of adoption that Respondents proved in the instant case. *See* Petition at 24-26; *compare Firesheets*, 134 F.3d at 731-32 (employer did not follow contract in several respects, including payment of wages and holiday pay); *Moglia*, 403 F.2d at 118 (employer's continuing refusal to agree to contract clearly evidenced intent not to be bound); *Empire Excavating*, 693 F. Supp. at 1561-63 (employer refused to pay benefit fund rate in current contract).

In sum, Petitioner has failed to meet its burden of demonstrating a conflict among the Courts of Appeal as to the indicia employed by the Second Circuit in finding adoption. Accordingly, the Petition should be denied.

CONCLUSION

For the reasons set forth herein, the Trustees respectfully request that the Court deny the Petition.

Respectfully submitted,

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